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WILCOX & CO

No. 7781

United States Circuit Court of Appeals

For the Ninth Circuit.

CHARLES DEMMERT, for himself and all other taxpayers similarly situated,

Appellant,

vs.

WALSTEIN G. SMITH, as Territorial Treasurer of the Territory of Alaska,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Territory of Alaska, Division Number One, at Juneau.

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

No. 7781

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

WILLIAM L. PAUL, Esq.,
Juneau, Alaska,
Attorney for Appellant.

JAMES S. TRUITT, Esq.,
Juneau, Alaska,
Attorney for Appellee.

In the District Court for the Territory of Alaska, Division Number One, At Juneau.

No. 3618 A

CHARLES DEMMERT, for himself and for all other taxpayers similarly situated.

Plaintiff.

vs.

WALSTEIN G. SMITH, as Territorial Treasurer of the Territory of Alaska.

Defendant.

AMENDED COMPLAINT

Comes now the plaintiff above named, for himself and for all taxpayers similarly situated in Alaska, and complains of the defendant above named as Territorial Treasurer of the Territory of Alaska, and for cause of action against the defendant as such, alleges:

I.

That at all times mentioned in this complaint and for more than ten years last past this plaintiff was and now is a citizen of the United States, and a resident of the Territory of Alaska, and for more than five years last past was and now is a taxpayer in said Territory of Alaska; that he is the owner of real and personal property within the Territory of Alaska, a taxpayer thereon, and for more than five years has and now pays taxes to the Territory of Alaska for general Territorial purposes and uses.

II.

That at all the times in this complaint mentioned Walstein G. Smith, defendant, was and now is the duly elected, qualified and acting Treasurer of the Territory of Alaska, and as such was and is the lawful custodian of all public monies raised therein by general taxation and by license taxes for public Territorial use, and was at all such times and now is in possession of all the sums of public monies hereinafter mentioned at the time of passage and approval of the special appropriation bill passed by the Legislature of Alaska, and [1]* approved by the Governor of the Territory of Alaska on the 4th day of May, 1933; that it was at all such times and now is part of his duty and power to pay out said public funds and monies belonging to said Territory in payment of all lawful and legally enacted appropriation bills so enacted by said Legislature of Alaska so lawfully and legally approved by the Governor of Alaska upon warrants drawn upon the Treasurer by such officers as shall be lawfully authorized so to do by law and not otherwise.

III.

That on the sixth day of March, 1933, the Legislature of Alaska convened at Juneau, Alaska, in regular session under the terms of the Act of Congress entitled "An act to create a legislative power thereon, and for other purposes," approved by the President of the United States on August 24, 1912.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

(27 Stat. L. 512), and on or about the 4th day of May, 1933, passed and on the 4th day of May, 1933, the Governor of Alaska approved an act of said Legislature entitled "An act for the purpose of aiding, as far as the Territory is financially able, in providing relief and work relief for persons affected by the conditions set forth in Senate Bill No. 128 (Chapter 115, Session Laws of Alaska, 1933), for the biennium ending March 31, 1935, and declaring an emergency," thereby making certain special appropriations for the support of the Territorial government of the Territory of Alaska, as therein set out and specified for the periods therein mentioned; and that the said Legislature of Alaska included in said appropriation bill and thereby attempted to appropriate to the uses therein mentioned the following items in the words and figures as follows:

1) FOR DEPENDENT CHILDREN

Care of Dependent Children including allowances to mothers and other incidental expenses $90,000.00

[2]

2) ALLOWANCE FOR CERTAIN AGED RESIDENTS

Allowances for certain aged residents of Alaska as provided by law $185,000.00

3) FOR RELIEF OF DESTITUTION

Relief of Destitution as provided by Article III of Chapter 65, Session Laws of Alaska, 1929 $20,000.00

4) FURTHER RELIEF OF THE NEEDY AND INDIGENT

Relief of the Needy and Indigent as provided by Article IV of Chapter 65, Session Laws of Alaska, 1929	$45,000.00

That the specific purpose of said appropriation bill and conditions for the distribution of said monies are more fully set out in Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933.

IV.

That the said Acts of the Legislature of the Territory of Alaska, as to the items above set forth in the foregoing paragraph of this complaint, and as to the above mentioned Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, were and are ultra vires and not within the legislative power of the said Legislature to enact; and the said items and Chapter 65, Session laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, were so attempted to be enacted into the law by the said Legislature without legislative power so to do and in violation of the provisions of the existing laws of the United States of America passed by the Congress thereof, prior to the passage of said appropriation act by the Legislature on the 4th day of May, 1933, and Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, and in violation of Title 8, Sections

41 and 42, United States Code, in that the said laws of Alaska discriminate against Indian citizens of the United States, otherwise qualified, in the following words:

> "Section 26. Whenever it appears to the Governor, by clear and convincing evidence, that the mother of any child under sixteen (16) years of age (except [3] native children who are eligible for provision by the Department of Interior);"

And also

> "Section 28. When Applicable to Indians and Eskimos. This Act shall not inure to the benefit of any Indian or Eskimo resident of the Territory who is provided for by the Department of the Interior out of the funds of the Treasury of the United States or to any ward of the Government of the United States. (Section 8 Chapter 46, 1923)".

by reason of which sections of the said laws, applications for relief by Indians otherwise qualified are denied and the said Indians are objects of discrimination, and are deprived of the benefits of the said laws and appropriations made thereunder, solely because of race, all contrary to Sections 41 and 42 of Title 8, United States Code; that said items so alleged in the foregoing paragraph of this complaint and Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, were and now are ultra vires and

void because the same were attempted to be enacted and passed by said Legislature in violation of the Acts of Congress passed prior thereto, and because the said items and said Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, were passed without any power so to do, and in violation of the said Organic Act of August 24, 1912, so creating the said Legislature of Alaska and conferring legislative power thereon, and the defendant herein as Treasurer of the Territory of Alaska has no power or authority to pay said items in the manner prescribed by said Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, or in any other manner, from the monies and public funds belonging to the Territory of Alaska in his possession as Such Treasurer, because the said Acts containing the said items, and said Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, so far as the said items are concerned, were and are to that extent ultra vires and in violation of the laws of the United States and the Constitution thereof and the said [4] Organic Act creating the Legislature and conferring legislative power thereon.

V.

That the said items complained of in paragraph III of this complaint will be paid out by the defendant illegally and in violation of the laws and Constitution of the United States, without this court

shall prevent the defendant from so doing by its power of injunction; that said sums will thereby be lost from the public funds so in possession of defendant as such Territorial Treasurer and their illegal and unlawful payment for unlawful and unauthorized purposes will greatly increase the taxes which this plaintiff and other taxpayers in Alaska are obliged to pay to maintain the government, to their great loss and damage; that plaintiff has not, and other taxpayers similarly situated in Alaska have not, any plain, speedy or other adequate remedy at law to prevent the unauthorized and unlawful expenditure and loss of said public funds so paid into the Territorial Treasury of Alaska for the maintenance of government.

WHEREFORE plaintiff prays this court to render judgment herein for the plaintiff and to perpetually enjoin the defendant, Walstein G. Smith, as such Territorial Treasurer of Alaska, from disbursing or paying out of the monies and public funds so in his possession as such Treasurer any of the said sums so mentioned and described in this complaint for any of the uses and purposes therein set forth, under the authority of said Acts of the Territory, and every one of the said items be declared and is ultra vires and void for being enacted in violation of the laws of the United States and the Constitution thereof; and especially the said Organic Act of August 24, 1912, creating the Legislature and conferring legislative power, and further decree that the appropriations of said sums so complained of in paragraph III of this complaint are [5] ultra vires

and void as being unauthorized by any existing law or at all.

That the court grant in its said final judgment and decree lawful and proper to effectually enjoin and prevent the payment of said sums of money complained of by plaintiff in this his complaint, by said Treasurer for and on said illegal and void appropriations, and for general relief, and for his costs and disbursements in *hits* action.

WILLIAM L. PAUL
Attorney for plaintiff. [6]

United States of America
Territory of Alaska—ss

William L. Paul, being first duly sworn, deposes and says that he is the attorney for plaintiff in the above entitled action, that he makes this verification because plaintiff is not at the place where verification is made, Juneau, Alaska; that he has read the hereto attached amended complaint, that each and every materialy fact is within his personal knowledge, that the same is true.

WILLIAM L. PAUL

Subscribed and sworn to before me this 10th day of July, 1934.

[Seal] FRANK H. FOSTER
Notary Public for Alaska

My commission expires August 8, 1935.

Copy received July 10th, 1934.
JAS. S. TRUITT
Attorney General for Alaska.

[Endorsed]: Filed Jul 10 1934 [7]

[Title of Court and Cause.]

DEFENDANT DEMURRER TO PLAINTIFFS AMENDED COMPLAINT

Comes now the said above named Defendant, Walstein G. Smith, as Territorial Treasurer of the Territory of Alaska, by Jas. S. Truitt, Attorney General for Alaska, and demurs to the said above named Plaintiffs Amended Complaint, in said above entitled Court and alleged cause of Action, and for ground of Demurrer alleges:

First: That the Court has no jurisdiction of the person of the Defendant or the subject of the action

Second—That the Territory of Alaska, the real party in interest against which the Injunction is sought, cannot be sued without its consent;

Third—That the Plaintiff has no legal capacity to sue;

Fourth—That the Complaint does not state facts sufficient to constitute a cause of action or to entitle the said Plaintiff to the relief, or any relief therein demanded;

WHEREFORE Defendant demurs to the whole Complaint in said alleged cause of action and prays that the Plaintiff take nothing herein and that the Defendant be awarded judgment for his costs and disbursements herein and on account hereof expended.

JAS. S. TRUITT
Attorney for the Defendant

Service of the above and foregoing Demurrer accepted and receipt of copy thereof acknowledged this the 12 day of July 1934.

WM. L. PAUL
Attorney for Plaintiff
By: WM. L. PAUL JR.

[Endorsed]: Filed Jul 14 1934 [8]

[Title of Court and Cause.]

ORDER SUSTAINING DEFENDANTS DEMURRER TO PLAINTIFFS AMENDED COMPLAINT

This action having been brought to trial on the issue of law joined herein, after hearing Jas. S. Truitt, Attorney General of Alaska, in support of the Demurrer and William L. Paul, in opposition:

IT IS ORDERED, ADJUDGED and DECREED, that the said Demurrer be, and the same is hereby, sustained, but with leave to the plaintiff to plead over within ten days.

Dated in open Court this the 27th day of November, 1934.

GEO. F. ALEXANDER
Judge of the District Court First Division

Entered Court Journal No 9 page 238

[Endorsed]: Filed Nov. 27 1934 [9]

In the District Court for the Territory of Alaska
Division Number One, At Juneau

No. 3618 A

CHARLES DEMMERT, for himself and all other Tax-payers similarly situated,

Plaintiff,

vs

WALSTEIN G. SMITH, as Territorial Treasurer of the Territory of Alaska,

Defendant

JUDGMENT FOR DEFENDANT, AFTER ORDER SUSTAINING DEMURRER.

It appearing to the Court that an Order was made and entered in this action, on the 24th day of November, 1934, sustaining the Defendants demurrer to the said Plaintiffs amended Complaint, with leave to the said Plaintiff to plead over within ten days thereafter, and,

It further appearing to the Court that more than ten days have elapsed since the making and entering of said Order, sustaining said demurrer and the said Plaintiff having wholly failed and neglected to plead over in said Court and cause, as by said order allowed; therefore,

On motion of Jas. S. Truitt, attorney for the said defendant,

IT IS ORDERED AND ADJUDGED, that the amended complaint herein be, and the same is hereby dismissed, and that the defendant have and

recover his costs of the said plaintiff in the sum of $8.00, as taxed by the Clerk of this Court.

Done and dated in open Court this the 12 day of December, 1934.

GEO. F. ALEXANDER
Judge of the District Court.

Entered Court Journal No. 9 Page 267

[Endorsed]: Filed Dec 12 1934. [10]

[Title of Court and Cause.]

PETITION FOR LEAVE TO APPEAL

To the Honorable Geo. F. Alexander, Judge of the District Court, for the Territory of Alaska, Division number one, at Juneau;

The above named CHARLES DEMMERT, conceiving himself aggrieved by the Judgment and decree made and entered in the above entitled Court on December 12, 1934, whereby it was ordered, adjudged and decreed that this cause be dismissed, and that defendant recover his costs and disbursements herein from the Plaintiff,

Does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said order and judgment for the reasons set forth in the assignment of errors, and prays that his petition for said appeal be allowed, and that a transcript of the record, duly authenticated, may be sent to the United States Circuit Court of Appeals for the

Ninth Circuit at San Francisco, California, and that a citation may issue as provided by law.

Dated at Juneau, Alaska, this 3d day of January, 1935.

WILLIAM L. PAUL
Attorney for Plaintiff

ORDER GRANTING PETITION FOR APPEAL

The foregoing petition for appeal is granted, and the claim of appeal made therein is allowed, and the bond on appeal is fixed in the sum of $250.00.

Dated at Juneau, Alaska, the 3rd day of January, 1935.

GEO. F. ALEXANDER
Judge.

Copy received January 3, 1935
JAS. S. TRUITT,
Attorney for Defendant

Entered Court Journal No. 9 Page 287.

[Endorsed]: Filed Jan 3 1935 [11]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Charles Demmert, plaintiff in the above-entitled cause, assigns the following errors made by the trial court in the rendition and entry of the judgment herein and the order sustaining the demurrer of

defendant to plaintiff's amended complaint upon which the said plaintiff and appellant will rely in the United States Circuit Court of Appeals for the Ninth Circuit for a reversal of said judgment and said order sustaining the demurrer, as follows, to wit:

I.

The court erred in making its order sustaining the demurrer to plaintiff's amended complaint, which said order (omitting title) is in words and figures as follows:

> "This action having been brought to trial on the issue of law joined herein, after hearing Jas. S. Truitt, Attorney General of Alaska, in support of the Demurrer and William L. Paul, in opposition:
>
> "IT IS ORDERED, ADJUDGED AND DECREED, that the said Demurrer be, and the same is hereby, sustained, but with leave to the plaintiff to plead over within ten days."
>
> "Dated in open court this the 24th day of November, 1934.
>
> "GEO. F. ALEXANDER
> "Judge of the District Court First Division"

II.

The court erred in making and entering herein its judgment for Defendant, after Order sustaining

Demurrer, which said judgment (omitting title) is in words and figures as follows, to wit: [12]

"It appearing to the Court that an Order was made and entered in this action, on the 24th day of November, 1934, sustaining the Defendants demurrer to the said Plaintiff's amended Complaint, with leave to the said Plaintiff to plead over within ten days thereafter, and,

"It further appearing to the Court that more than ten days have elapsed since the making and entering of said Order, sustaining said demurrer and the said Plaintiff having wholly failed and neglected to plead over in said Court and cause, as by said order allowed; therefore,

"On motion of Jas. S. Truitt, attorney for the said defendant,

"IT IS ORDERED AND ADJUDGED, that the amended complaint herein be, and the same is hereby dismissed, and that the defendant have and recover his costs of the said plaintiff in the sum of $..... as taxed by the Clerk of this Court.

"Done and dated in open Court this 12th day of December, 1934.

"GEO. F. ALEXANDER,
"Judge of the District Court".

WHEREFORE the plaintiff prays that on account of the errors hereinbefore mentioned and others manifest of record herein, the order allowing

the demurrer and the judgment of the District Court of the District of Alaska, Division Number One, in this cause be reversed and the cause remanded with instructions to enter judgment and decree in favor of the plaintiff herein.

WILLIAM L. PAUL
Attorney for Plaintiff

Copy received this 3 day of January, 1935.
JAS. S. TRUITT
Attorney for Defendant

[Endorsed]: Filed Jan. 3, 1935 [13]

[Title of Court and Cause.]

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, Charles Demmert, Plaintiff-appellant herein, as principal, and W. J. B. McAuliffe and Jake Cropley, as sureties, both residents of the Territory of Alaska, Division Number One, are held and firmly bound unto the above named Walstein G. Smith, as Treasurer of the Territory of Alaska, defendant-appellee, in the sum of $250.00, to be paid to the said defendant-appellee, for the payment of which sum well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 7th day of January, 1935.

WHEREAS, the above named Charles Demmert has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and decree rendered in the above entitled suit by the District Court for the Territory of Alaska, Division Number One, at Juneau, on January 3rd, 1935.

NOW, THEREFORE, the condition of this obligation is such that if the above named Charles Demmert shall prosecute his said appeal to effect and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void, otherwise the same shall be in full force and effect.

CHARLES DEMMERT
Principal

WILLIAM L. PAUL
His attorney

W. J. B. McAULIFFE
Surety

JAKE CROPLEY
Surety [14]

United States of America
Territory of Alaska—ss

We, the undersigned, W. J. B. McAuliffe and Jake Cropley, whose names are subscribed to the within bond as sureties thereon, being first severally duly sworn, depose and say:

That we are both residents of the Territory of Alaska, Division Number One, and that neither of

us is an attorney nor counsellor-at-law, clerk of any court nor other officer of any court, and that we are each worth the sum of $250.00 over and above all our just debts and liabilities, exclusive of property exempt from execution.

W. J. B. McAULIFFE
JAKE CROPLEY

Subscribed and sworn to before me this 7th day of January, 1935.

[Seal] ALBERT WHITE
Notary Public for Alaska

My Commission expires March 28, 1937

Approved this 9th day of January, 1935.
GEO. F. ALEXANDER
Judge

[Endorsed]: Filed Jan 9 1935 [15]

[Title of Court and Cause.]

CITATION ON APPEAL

United States of America—ss

To Walstein G. Smith, as Treasurer of the Territory of Alaska

GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, within thirty days from and after this date, pursuant to an appeal filed in the

Clerk's Office of the District Court for the Territory of Alaska, Division Number One, at Juneau, in the above entitled cause, wherein Charles Demmert, the appellant herein was plaintiff and Walstein G. Smith, as Treasurer of the Territory of Alaska, appellee herein, was the defendant, to show cause, if any there be, why the judgment and decree entered in said cause of Charles Demmert, Plaintiff vs Walstein G. Smith, as Treasurer of the Territory of Alaska, Defendant, on December 12, 1934, and referred to in the petition for an appeal filed in said cause, which said appeal was, by order of the Court allowed, as prayed for, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, this 9 day of January, in the year of our Lord one thousand nine hundred and thirty five.

[Seal] GEO. F. ALEXANDER
Judge of the District Court, Territory of Alaska, Division Number One.

Attest:
ROBERT E. COUGHLIN
Clerk

Service admitted this 9 day of January, 1935.
VELLA MOEHRING
Clerk for Attorney for Defendant-Appellee

Entered Court Journal No. 9 Page 291

[Endorsed]: Filed Jan 9 1935 [16]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court for the Territory of Alaska, Division Number one;

You will please prepare a transcript of the record of the above entitled cause and transmit the same to the Clerk of the Circuit Court of Appeals for the Ninth Circuit to be used in the appeal herein, said transcript to include the following;

1. Amended complaint;
2. Defendant's demurrer to Plaintiff's amended complaint;
3. Order sustaining defendant's demurrer to Plaintiff's amended complaint;
4. Judgment for defendant after order sustaining demurrer and dismissing the action.
5. Petition for appeal and order allowing same;
6. Assignments of error;
7. Bond on appeal;
8. Citation.
9. This praecipe.

All of which are to be prepared with a view to transmitting the same to the United States Circuit Court of Appeals *for the Ninth Circuit Court of Appeals* for the Ninth Circuit in connection with the appeal herein within the time limited by the rules of that court, and when so prepared you will transmit this record to the Clerk of the United States

Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

WILLIAM L. PAUL
Attorney for Plaintiff

Copy received this 9 day of January, 1935
VELLA MOEHRING
Clerk for Attorney for Defendant
[Endorsed]: Filed Jan 9 1935 [17]

In the District Court for the District of Alaska, Division No. 1, at Juneau Alaska

United States of America,
District of Alaska,
Division No. 1.—ss:

CERTIFICATE.

I, ROBERT E. COUGHLIN, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 18 pages of typewritten matter, numbered from 1 to 18, both inclusive, constitute a full, true and complete copy, and the whole thereof, as per the praecipe of the plaintiff-appellant on file herein and made a part hereof in a cause wherein CHARLES DEMMERT, For himself and all other tax-payers similarly situated is Appellant, and WALSTEIN G. SMITH, as Territorial Treasurer of the Territory of Alaska is Appellee, case No. 3618-A, as the same appears of record and on file in my office, and that the said record is by virtue

of an APPEAL and Citation issued in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office and the cost of preparation, examination and certificate amounting to Seven Dollars and forty cents ($7.40) has been paid to me by the plaintiff-appellant.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled Court this 16th day of February, 1935

[Seal] ROBERT E. COUGHLIN
Clerk.
By VENETIA PUGH
Deputy. [18]

[Endorsed]: No. 7781. United States Circuit Court of Appeals for the Ninth Circuit. Charles Demmert, for himself and all other taxpayers similarly situated, Appellant, vs. Walstein G. Smith, as Territorial Treasurer of the Territory of Alaska, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Division Number One, at Juneau.

Filed February 26, 1935.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7711

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRUST COMPANY,

Appellant,

vs.

J. O. ENGLAND, as Trustee in Bankruptcy of Northern Counties Land and Cattle Company (a corporation), Bankrupt, COAST HOLDING CORPORATION (a corporation), and FRANK T. ANDREWS, as Trustee in Bankruptcy of Alexandria Hotel Realty Corporation (a corporation), Bankrupt,

Appellees.

BRIEF FOR APPELLEES J. O. ENGLAND, AS TRUSTEE IN BANKRUPTCY OF NORTHERN COUNTIES LAND AND CATTLE COMPANY, A CORPORATION, BANKRUPT, AND COAST HOLDING CORPORATION, A CORPORATION.

FRED S. HERRINGTON,
333 Montgomery Street, San Francisco,
Attorney for Appellee, J. O. England, as Trustee in Bankruptcy of Northern Counties Land and Cattle Company (a corporation), Bankrupt.

DINKELSPIEL & DINKELSPIEL,
333 Montgomery Street, San Francisco,
Attorneys for Appellee, Coast Holding Corporation (a corporation).

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 7711

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J. O. ENGLAND, as Trustee in Bankruptcy of Northern Counties Land and Cattle Company (a corporation), Bankrupt, COAST HOLDING CORPORATION (a corporation), and FRANK T. ANDREWS, as Trustee in Bankruptcy of Alexandria Hotel Realty Corporation (a corporation), Bankrupt,

Appellees.

BRIEF FOR APPELLEES J. O. ENGLAND, AS TRUSTEE IN BANKRUPTCY OF NORTHERN COUNTIES LAND AND CATTLE COMPANY, A CORPORATION, BANKRUPT, AND COAST HOLDING CORPORATION, A CORPORATION.

STATEMENT OF FACTS.

This is an appeal from the order made by Honorable T. J. Sheridan, Referee in Bankruptcy, under date of March 24, 1934, and affirmed by Honorable A. F. St. Sure, United States District Judge, under date of October 17, 1934, directing Frank T. Andrews, trustee in bankruptcy of Alexandria Hotel Realty Corpora-

tion, a corporation, bankrupt, to pay to J. O. England, as trustee in bankruptcy of Northern Counties Land and Cattle Company, a corporation, certain funds aggregating $4359.03, constituting the net proceeds of the operation by the said Frank T. Andrews as such Trustee, of a cattle range referred to herein as the "Diamond Range".

The question presented is a determination of the rights of the respective parties to said fund.

At all times here involved the Northern Counties Land and Cattle Company, a corporation, was the owner of that certain real property located in Tehama County, California, which will hereafter be referred to as the "Diamond Range". The American Trust Company is the Trustee under a trust deed securing a bond issue constituting a first encumbrance on the Diamond Range. The second mortgage is not concerned in the present proceeding. The Alexandria Hotel Realty Corporation, a corporation, was the holder of a third mortgage on said Diamond Range, said third mortgage being in the form of a deed absolute. (Record, page 33.) Prior to any of the proceedings hereinafter mentioned, the Alexandria Hotel Realty Corporation, was adjudged bankrupt, and Frank T. Andrews became the trustee in bankruptcy of said corporation.

The said Frank T. Andrews, as such trustee in bankruptcy, entered upon the said Diamond Range on September 17, 1932, and thereafter operated said property under circumstances hereinafter more particularly set forth. On October 13, 1932, appellant, American Trust Company, trustee under said trust

deed, filed with the Referee in Bankruptcy in the matter of the bankruptcy proceedings of said Alexandria Hotel Realty Corporation, a petition for an order authorizing the sale of said Diamond Range, and also a petition for an order sequestering the proceeds of its operation by Frank T. Andrews, as such trustee in bankruptcy. As stated in appellant's brief, the petition for sale was denied without prejudice to the renewal thereof not less than 60 days thereafter, and on January 26, 1933, the said Referee made an order granting the petition for order of sequestration and directing Frank T. Andrews to apply the proceeds thereof as set forth on page 2 of appellant's brief.

The Northern Counties Land and Cattle Company, a corporation, mortgagor and owner of the fee of said Diamond Range, was not made a party to nor joined in any manner in said sale proceedings or in said sequestration proceedings, and, of course, was not bound thereby.

On July 26, 1933, the said Referee made an order granting a supplemental petition of the American Trust Company for authority to sell and directed Frank T. Andrews, trustee in bankruptcy of the Alexandria Hotel Realty Corporation, to surrender possession of the property to the American Trust Company. Pursuant to said order Frank T. Andrews surrendered possession on August 12, *1933*. (Record, page 34.) The Northern Counties Land and Cattle Company was not made a party to nor joined in this last-mentioned proceeding. *All of the moneys in dispute here were collected by Andrews before the appellant took actual possession on August 12, 1933.*

On July 28, 1933, the Northern Counties Land and Cattle Company (mortgagor and owner of the fee) served upon said Frank T. Andrews its claim to the funds in his possession, and demanded that said Andrews deliver to it the rents, issues and profits derived from said Diamond Range. On September 14, 1933, the American Trust Company filed with said Refere in connection with the proceedings of the Alexandria Hotel Realty Corporation, bankrupt, its petition for release of impounded funds (Record, page 2) to which petition Frank T. Andrews, as trustee of said Alexandria Hotel Realty Corporation filed his answer in which was set forth the claim made upon him on July 28, 1933, by the Northern Counties Land and Cattle Company claiming the said funds, and praying for an order requiring said Northern Counties Land and Cattle Company to propound any claim or interest which it might have or assert against the said funds. (Record, pages 7-12.)

Pursuant to said answer the Northern Counties Land and Cattle Company appeared in the proceedings *for the first time* and filed its claim to said funds, and Coast Holding Corporation, a corporation, a creditor of Northern Counties Land and Cattle Company, after leave of Court first obtained, filed its answer to the order to show cause issued upon the answer of said Frank T. Andrews, praying that the funds be paid to the Northern Counties Land and Cattle Company, or to its trustee in bankruptcy upon his election and qualification. An involuntary petition in bankruptcy had been filed against said Northern Counties Land and Cattle Company on October 25,

1933. (Record, page 27.) Thereafter, to-wit, on February 14, 1934, J. O. England became the duly appointed, qualified and acting trustee in bankruptcy of Northern Counties Land and Cattle Company (pending in the United States District Court for the Northern District of California, numbered 23,803-L) and by stipulation of all parties it was agreed that said J. O. England, as trustee in bankruptcy of said Northern Counties Land and Cattle Company, should for all of the purposes of the said proceedings, be substituted in the place and stead of the Northern Counties Land and Cattle Company, a corporation. (Record, page 53.)

Prior to October 13, 1932, the date upon which the American Trust Company filed its original petition to sequester the funds, Frank T. Andrews had received as the net proceeds of his operation of the Diamond Range the sum of $658.66. The balance of the funds in his possession were collected by said Andrews between October 13, 1932, and August 12, 1933, the date that said Andrews surrendered possession of the Diamond Range to the American Trust Company, pursuant to the order made by the Referee under date of July 26, 1933, as aforesaid.

All of the parties hereto stipulated that they would be bound by the decision of the United States District Court provided, however, that nothing contained in said stipulation should preclude any party from appealing from any order or decision of the Court. (Record, page 89.) The sole purpose of this stipulation was to avoid multiplicity of suits and to make a decision of the issues presented herein binding upon the

parties hereto. Pursuant to said stipulation the order of the United States District Court affirming the order theretofore made by the Referee in Bankruptcy was rendered providing that the order should stand as a final determination of the merits, pursuant to the stipulation of the parties. (Record, page 94.)

The facts show that Frank T. Andrews, the Trustee of Alexandria Hotel Realty Corporation, entered upon the Diamond Range on September 17, 1932, and that his reason for entering upon the property at that time was "that he went on said property to see what was doing and found the same inactive; that it had not been producing any revenue; that he made arrangements at that time to lease land and run cattle on said Diamond Range". (Record, page 38.) Both the facts and findings show that Frank T. Andrews did not ask for or obtain the consent of the Northern Counties Land and Cattle Company before entering upon said property and that at no time was action taken by the Northern Counties Land and Cattle Company, a corporation, or its directors, authorizing, consenting to or acquiescing in the possession thereof by the said Andrews. (Record, pages 38, 39, 40, 41, 42.) The facts further show that at the time said Andrews entered upon the Diamond Range the capital stock of the Northern Counties Land and Cattle Company was the subject of the trust indenture in which Pacific National Bank was trustee, and that during the month of September, 1932, under a demand for possession of all properties covered by the said trust indenture, the said Pacific National Bank came into possession of all

of the outstanding capital stock of the Northern Counties Land and Cattle Company and thereupon officers of the Pacific National Bank were regularly substituted for and as officers of said Northern Counties Land and Cattle Company, a corporation (Record, pages 41 and 43), and that within a month after September 17, 1932 (the date on which Frank T. Andrews entered upon the Diamond Range), he was notified by one John Geary, representing the said Pacific National Bank, that he was in unlawful possession of said Diamond Range. (Record, pages 40 and 41.)

All of the aforementioned proceedings instituted by the American Trust Company were had in the matter of the Alexandria Hotel Realty Corporation, a corporation, bankrupt, pending in the United States District Court for the Northern District of California, Southern Division, action therein numbered 22131-S, and the first occasion upon which Northern Counties Land and Cattle Company (the owner of the fee, and mortgagor), was brought in as a party thereto was pursuant to the order to show cause issued by the Referee on September 30, 1933, upon the answer of Andrews to the petition for release of impounded funds filed by American Trust Company on September 14, *1933*. (Record, page 74.)

Inasmuch as the position of appellee Coast Holding Company is that of a creditor of the Northern Counties Land and Cattle Company, the owner-mortgagor, the said Coast Holding Company has deemed it best to join with J. O. England, as trustee in bankruptcy, of

said mortgagor, upon this brief, which is hereby respectfully submitted as the joint brief of said appellees.

ARGUMENT.

A. APPELLANT'S AUTHORITIES ARE READILY DISTINGUISHABLE.

At the outset we desire to distinguish the cases relied on by appellant, and to point out that such cases utterly fail to support the propositions upon which appellant has cited them. In fact, most of appellant's authorities will be found to actually support these appellees.

Opposing counsel commence their argument by quoting a portion of appellant's mortgage or deed of trust which they claim in and of itself entitles appellant to the rents collected by Andrews. We shall hereinafter demonstrate that these particular provisions of the mortgage do not even purport to automatically entitle appellant to the rents, issues and profits of the mortgaged premises, but on the contrary are expressly conditioned upon the prior performance by appellant of certain requirements, in the nature of express conditions precedent, which it never in fact performed or attempted to perform.

In fact, opposing counsel themselves recognized the utter fallacy of their contentions by conceding, at page 10 of their brief, that appellant would not be entitled to rents accruing prior to the time appellant first moved to have the rents, issues and profits sequestered.

In other words, appellant recognizes the fact that certain steps and proceedings had to be taken by it before it could claim to be entitled to said rents.

The first case cited by opponent, that of *Synder v. Western Loan and Building Co.,* 1 Cal. (2nd) 697; 37 Pac. (2nd) 86, falls far short of supporting appellant. In that case the mortgagee actually acquired possession of the encumbered property *to the exclusion of the mortgagor* and collected rents while so in possession. The Court held that in such event the mortgagee might retain such rents so collected and apply same against the mortgage debt. In our case the appellant never at any time during the period in question actually entered into possession and did nothing, pursuant to the trust instrument or otherwise, toward excluding the mortgagor from the possession of the property. The cases are utterly dissimilar on their facts. Even assuming for the moment that appellant's mortgage gave it the right to take possession, still appellant never endeavored to exercise this right *as against the mortgagor* and until this was done appellant could acquire no right to the rents. Appellant was content merely to seek an order of sequestration against Andrews, the junior mortgagee, which was utterly ineffective against the mortgagor, either to exclude the mortgagor from possession or to otherwise affect or cut off any of the preexisting rights of the mortgagor, because the mortgagor was not made a party to the sequestration proceedings so as to be bound thereby. Clearly appellant never became a "mortgagee in possession".

Referring to the next case cited (Appellant's Brief, page 9), that of *Mines v. Superior Court,* 216 Cal. 776; 16 Pac. (2nd) 732, a reading thereof shows clearly that the case merely holds that a trustee under a deed of trust may commence an action against the trustor for the specific performance of the provisions of a deed of trust and may, in such action, obtain the appointment of a receiver to take possession of the premises and collect the rent. This principle is in no way involved in the case at bar. The appellant here never at any time during the period in question instituted any proceeding for the appointment of a receiver for the property nor any proceeding analogous thereto. At least it commenced no such proceeding to which the trustor here was ever made a party, nor were the monies in question collected by any person acting as receiver for the appellant. These monies were collected by Andrews as trustee in bankruptcy for the bankrupt estate of Alexandria Hotel Realty Corporation, whom we will hereafter refer to for the sake of brevity as the "junior mortgagee", purporting to act on his own behalf solely. Thus the *Mines* case, supra, is inapplicable and therefore does not support appellant in the slightest.

The next case, that of *American Securities Co. v. van Loben Sels,* 218 Cal. 662; 24 Pac. (2nd) 499, is in exactly the same category as the *Mines* case, supra, merely holding that in an action for specific performance of a deed of trust a receiver may be appointed. In fact, the Court, in the *American Securities* case, supra, based its decision therein entirely on its previ-

ous decision in the *Mines* case, supra; and for these reasons the case is not in point.

B. THE MORTGAGOR IS NOT BOUND BY THE ORDER OF SEQUESTRATION, AND THE MORTGAGOR'S RIGHTS REMAIN UNIMPAIRED THEREBY.

The important fact in our case is, as is shown in appellant's own brief at page 5 thereof, *that the Northern County Land and Cattle Co., whom we shall herein refer to as the "mortgagor", was never at any time or in any manner made a party to any of the proceedings in question until after the monies in dispute had already been collected by the junior mortgagee.* Furthermore, at the time when the order of sequestration was granted the mortgagor was not a party to those proceedings, and under no possible theory can the mortgagor or its bankruptcy trustee be concluded or bound in any way by such order. In the first place the order does not even purport to bind the mortgagor; and even if it should so purport, it could not legally be binding on the mortgagor inasmuch, as has been pointed out, the Court making it had no jurisdiction over the person of the mortgagor at the time it was made. These principles of jurisprudence are so well established as to need no citation of authority. The fact of great significance to be noted at this point is that this same order, the so-called order of sequestration, which is not binding on the mortgagor, as we have seen, is the very order upon which appellant's entire claim to these monies is based. In fact, since appellant chose to take no action or proceeding against the mortgagor *directly,*

appellant is necessarily thereby forced to rely solely and entirely upon this order of sequestration. In view of the utter invalidity of the order of sequestration, at least in so far as the mortgagor is concerned, it not being a party thereto, it should be apparent that appellant must fail upon this appeal.

Referring again to appellant's authorities, we wish to point out that in none of them, so far as we can determine, is there any case going so far as to hold that a mortgagee, trustee or beneficiary can acquire or claim any right to rents, issues and profits unless and until possession of the encumbered premises is actually and lawfully taken and the rents, issues and profits collected while such possession continues, or unless and until a receiver has been appointed for such purpose by some court of competent jurisdiction.

In *Mortgage Loan Co. v. Livingston,* 45 Fed. (2nd) 28, cited and quoted from at pages 10 to 14 of opponent's brief, the mortgagees *requested* a bankruptcy receiver *of the mortgagor* to apply the rents against the mortgage debt, and the receiver voluntarily and willingly consented to comply with this request and thereupon did so comply. The principles there involved were vastly different than in the case at bar for in that case the situation was one where the mortgagee obtained the express consent of the mortgagor's representative or successor in interest, viz., his bankruptcy receiver, to the paying over or applying of the rents. The distinguishing feature in this last mentioned case is clearly pointed out and stressed by the Court in the opinion itself, more particularly in the

portion of the opinion quoted at page 13 of the opposing counsel's brief, reading as follows:

> "This is not a case where the mortgagor was permitted to remain in possession of the property and to receive and disburse the earnings, but is a case where a receiver was appointed, who, *at the demand of the mortgagees,* collected, impounded and separately kept these funds. *He was their receiver,* and nothing was done by him with these funds during his stewardship inconsistent with their application to a discharge of the pledge, and hence it cannot be said that the mortgagees are precluded from asserting their rights thereto by having remained silent. * * *" (Italics ours.)

In other words, the Court itself likened that case to one where *the mortgagee* himself had procured the appointment of a receiver to collect the rent, and the case was expressly decided on this sole ground. As we have heretofore pointed out the appellant in our case never took possession of the property, in person or by receiver, and the *Mortgage Loan Company* case, supra, clearly would not apply for that reason.

At page 11 of their brief, opposing counsel quote the following portion of the decision of the Court in the *Mortgage Loan Co.* case, supra, which strikes us as being directly in support of the contention we are here making concerning the effect of the invalidity of the order of sequestration. The portion quoted to which we refer reads as follows:

> "* * * *In the absence of a receivership, or other process by which the mortgaged property is in the control of the court,* a mortgagee of real property

> would not be entitled to the rents and profits of the mortgaged premises until he had taken actual possession, or until possession were taken in his behalf by a receiver, or until he had demanded such possession. Grafeman, etc., Co. v. Mercantile Club, 241 S. W. 923; Teal v. Walker, 111 U. S. 242, 4 S. Ct. 420, 28 L. Ed. 415; Freedman's Savings & Trust Co. v. Shepherd, 127 U. S. 494, 8 S. Ct. 1250, 32 L. Ed. 163; Atlantic Trust Co. v. Dana (C. C. A.), 128 F. 209, 219." (Italics ours.)

The announcement of this principle by the Circuit Court of Appeals of the Eighth Circuit, supported by two United States Supreme Court decisions in addition to other authority, should bear considerable weight with this Honorable Court, we submit, and in the face of these principles we cannot perceive by any stretch of the imagination how appellant can succeed on this appeal. The Court most plainly stated that in order for a mortgagee to entitle itself to rents, and profits of the kind here involved, it must first obtain the right thereto with the aid of some court which had obtained *"control"* of the mortgaged premises by means of some proper and effective *"process"*. Concededly no Court can validly control property, whether it be mortgaged premises or the rents and profits therefrom, unless and until the Court has power over and control (jurisdiction) of the parties involved, including the person owning and claiming such property. It is elementary that should a court attempt to control, dispose of or in any way affect the right in and to property of any person without first obtaining jurisdiction and "control" over the person of such owner, any such

attempt would be utterly void and therefore ineffective. Applied to the case at bar these principles necessarily impel the conclusion that the appellant gained no right to the money in question *as against the mortgagor* inasmuch as the Court which purported to give and grant to appellant the alleged rights which it now seeks to enforce, and which is the sole basis of appellant's claim, had absolutely no jurisdiction over the person of the mortgagor at the time the order purporting to grant such right was made. These rent moneys were not "in the control of the Court" at the time it purported to sequester them.

The situation in this respect is similar to that disclosed in *In re Francis-Valentine Co.*, 94 Fed. 793, 2 Am. B. R. 522, 526 (C. C. A., Calif., affirming 93 Fed. 953, 2 Am. B. R. 188), where the sheriff of the City and County of San Francisco was ordered by the Bankruptcy Court to turn over certain property to the bankruptcy trustee which property the sheriff had seized on execution prior to the bankruptcy in an action in which the bankrupt was plaintiff. The sheriff objected to the bankruptcy order, claiming that the Bankruptcy Court had no jurisdiction to summarily compel him to turn over the property to the bankruptcy trustee in view of the fact that a replevin suit, commenced by the American Type Founders Co., a third party claimant, was pending against the sheriff concerning said property. The Court held that the intervention of bankruptcy divested the sheriff of the right to continue in possession of the property just as it would have divested the possession of the bankrupt

itself since as the sheriff was holding for and on behalf of the bankrupt. The Court then went on to hold, in language pertinent to our case, as follows:

> "*The American Type Founders' Co. is not a party to the proceeding in the Bankruptcy Court, and its rights are in no way affected by the order upon the sheriff. It is not represented in the present proceeding.* The question is purely one of the respective rights of the sheriff and of the trustee of the estate of the bankrupt." (Italics ours.)

Thus we have demonstrated beyond question, we submit, that the order of sequestration upon which the appellant must predicate its entire case, at all times was and is void as to the mortgagor on account of the utter lack of jurisdiction over the person of said mortgagor in the Bankruptcy Court purporting to make said order. *On account of this fact, appellant can claim none of the rents, issues and profits which accrued prior to the time the mortgagor became a party to the bankruptcy proceedings.* This means that the appellant can claim no portion of the monies now in dispute, since it all accrued and was collected prior to the mortgagor's appearance in these proceedings.

At this juncture we desire to point out to this Honorable Court that appellant in its brief (page 15) has expressly waived all claim to that portion of the rents, issues and profits of the Diamond Range which were collected by Andrews as Trustee for the junior mortgagee prior to the time when appellant first appeared and petitioned for an order sequestering the proceeds of Andrew's operations. The sum to which

the appellant thus waives all claim amounts to $658.66. (Appellant's Brief, page 14.) In other words, appellant has thereby, in effect, consented to the order appealed from being sustained as to this amount at least.

C. APPELLANT'S CONTENTIONS ARE ALL UNSOUND AND FALLACIOUS.

While appellant purports to set forth nine separate alleged errors in its assignment of errors (Record, pages 97-99), so far as we can see these supposedly different alleged errors are merely repetitions or restatements in different phraseology of but four different contentions. It appears to us that appellant's entire position can be resolved into the following contentions, viz.:

(1) That by virtue of its trust deed alone and regardless of any other consideration, appellant is entitled to the rents which Andrews collected subsequent to time appellant moved to sequester them.

(2) That the junior mortgagee was entitled to collect and retain the rents, regardless of the fact that he entered upon the property and collected rents, all without the mortgagor's consent, either express or implied.

(3) That the finding of the Referee, which was approved by the District Court, to the effect that Andrews, as a bankruptcy trustee, took possession of and operated the property without the consent of the mortgagor, is not supported by the evidence.

(4) That the court erred in not directing the payment of taxes out of the net proceeds of the operations in question.

We shall now proceed to consider the aforesaid contentions, each in turn.

(1) The provisions of appellant's deed of trust do not entitle it to these rents.

After quoting certain provisions of the mortgage or deed of trust itself (Appellant's Brief, pages 8-9), appellant, upon the sole basis of these provisions, asserts its claim to the rents collected by the junior mortgagee, but thereupon qualifies its claim but expressly agreeing to restrict itself to the net rentals accruing subsequent to the date upon which it moved to sequester the same. (Appellant's Brief, page 15.) Why should appellant voluntarily restrict itself in this fashion? If the mortgage in and of itself entitled appellant to the rents in the event of a default, as appellant has just claimed, why should it thus waive claim to a considerable portion thereof ($658.66)? In voluntarily thus waiving all claim to such portion of the rents as accrued prior to the moment it first took affirmative action to exercise and rely upon such rights as the trust deed gave it, by filing the sequestration petition, has not appellant thereby recognized and conceded that actually, in law and in fact, it had no valid or effective right merely by force or virtue of the trust deed alone to claim any rents or profits, but only acquire such right through taking some affirmative action to enforce the provisions of the trust deed? Obviously such is the

case, and appellant's admission is quite apparent. Appellant has thus recognized that whatever possessory rights may have been conferred on it by these particular provisions of the deed of trust were but inchoate or potential rights, requiring some additional affirmative acts or proceedings being had or taken by the appellant in order to cause such potential rights to ripen and become actually or legally effective.

Having thus expressly admitted and conceded that the trust deed alone was not sufficient to entitle it to claim any rents or profits, and that some further action or proceeding must first be taken or instituted before any enforceable possessory right could arise, is not appellant obviously thereby compelled to go still further and admit that the further action or proceeding which was thus required of appellant must necessarily be of a sort legally sufficient, particularly from the jurisdictional standpoint, to vest or in some other effective manner affect the rights of the parties involved, which would, of course, include the mortgagor as the other party to the instrument in question? We submit the answer to this last query can only be in the affirmative. Such being the case, can it be for one moment contended that appellant's action in merely filing a petition for sequestration in a proceeding to which the mortgagor had never been made a party, and in a Court which lacked jurisdiction of the parties necessary to decide the controversy, could have been sufficient or adequate, from a standpoint of law, to in any way create rights in the appellant which it admittedly did not enjoy previous thereto and which rights could only be created at the

expense and equivalent loss of the mortgagor? Likewise, could the granting of the order of sequestration by a Court which lacked the necessary jurisdiction to bind the mortgagor, in any way affect or cut off the mortgagor's pre-existing rights and transfer such rights to the appellant mortgagee? Thus analyzed, the appellant's contentions become mere absurdities, we submit, particularly in view of its own admissions made as aforesaid.

In this regard it is quite significant, we believe, that nowhere in opposing counsel's brief have they contended or so much as intimated that they expect to contend that said order of sequestration was binding upon the mortgagor or in any way affected the mortgagor's rights. The appellants from the very beginning chose to proceed against the junior mortgagee alone and to entirely ignore the mortgagor by failing to make the mortgagor a party to the sequestration proceedings.

As pointed out, the order of sequestration constituted a void order as against the mortgagor and, therefore, could at best constitute but an ineffective attempt to exercise any such right of possession as appellant might then have had. Certainly, the order of sequestration, not being binding on the mortgagor, did not serve in the slightest to dispossess the mortgagor or in any way preclude or affect its right to possession.

It is clear, therefore, that appellant cannot claim to be entitled to the rents and profits in dispute by virtue of the aforesaid provisions of said deed of trust, in-

asmuch as it did not comply with the conditions thereof or take the steps or any of the steps which it has conceded were required thereby. Not only did the appellant fail to take possession of the property itself, but furthermore it did not in any legally effective or binding manner *dispossess* the mortgagor therefrom, in whole or in part.

Appellant quotes a portion of the deed of trust (Opponent's Brief, pages 8-9), which is ineffective to support the appellant. The pertinent parts of this portion of the trust deed read as follows:

> "*Upon filing a bill in equity, or upon the commencement of judicial proceedings,* * * * to enforce any right under this Indenture, the trustee shall be entitled to exercise any and all rights and powers herein conferred * * * and shall be entitled to the appointment of a receiver of the * * * earnings, revenues, rents, issues and profits, and other incomes thereof * * *; and shall be entitled to the application *by any such Receiver* of the net income * * *" (Italics ours.)

No proceedings of the kind thus required were here commenced by the appellant, and for that reason said paragraph of the deed of trust cannot apply or benefit the appellant in any way. Said paragraph contemplates, *and in fact expressly requires,* the filing of a bill in equity or the commencement of some other judicial proceeding. Such proceeding must necessarily be commenced *against the trustor.* Otherwise the trustor would not be bound thereby. On the contrary, the appellant elected to entirely ignore these provisions of the deed of trust and chose to proceed

entirely independent thereof by commencing a proceedings *against the junior mortgagee* wherein it failed to join the trustor as a party thereto. Under such circumstances surely appellant cannot now rely upon provisions of the deed of trust which it thus voluntarily elected to ignore. Not having complied with the terms or conditions of the deed of trust itself, appellant cannot claim rights against the mortgagor by virtue of the deed of trust or of any of the provisions thereof, particularly of those provisions of which it thus chose to proceed independently.

We, therefore, arrive at the unescapable conclusion that appellant can derive no benefit from the deed of trust itself, nor upon this appeal can it claim or rely upon any rights predicated upon these provisions of the deed of trust as against the mortgagor. In other words, through none of the steps taken or proceedings instituted did the appellant acquire any *direct rights* as against the mortgagor.

Therefore, appellant must stand or fall, upon this appeal, upon the strength of such proceedings as it instituted as against the junior mortgagee. Appellant can claim no rights as against the mortgagor excepting such, if any, as it may have derived *indirectly* through the junior mortgagee. We assume it must be conceded that the junior mortgagee was and is bound by the order of sequestration and, further, that if the junior mortgagee himself had acquired any rights as against the mortgagor, then the appellant may possibly claim and rely upon the same, if any. We shall now proceed to rule out this last mentioned

possibility, and to that end we shall next inquire as to whether the junior mortgagee at any time during the period in question acquired any rights as against the mortgagor, particularly any right to possession or any right to collect or retain or otherwise handle the rents, issues and profits of the property.

(2) The junior mortgagee entered upon the property unlawfully, by means of a trespass, and cannot claim to have been a "mortgagee in possession".

At the outset of this discussion we may state that it is our contention the junior mortgagee was wrongfully and unlawfully in possession, in the position of a trespasser in so far as the mortgagor was concerned, at all times prior to the moment when the mortgagor was joined as a party to the bankruptcy proceedings; and it will be remembered that the monies in question all accrued and were collected prior to the joinder of the mortgagor as a party.

As heretofore pointed out, the junior mortgagee's mortgage (which constitutes the sole source of any possible right of said junior mortgagee) was in the form of a deed absolute, containing no provision entitling the junior mortgagee to take possession in the event of default or to operate the property or to collect or retain any of the rents, issues and profits. It is definitely settled in California, as set forth recently in the *Snyder* case, supra, at page 701 thereof, and is uniformly the law elsewhere, that a mortgagee acquires no right to possession under a mortgage in the absence of a special agreement, excepting in the event the mortgagor may voluntarily surrender

up such possession by consent, express or implied. *In fact, it is provided by statute in California (C. C. P. 744; C. C. 2927) that a mortgagee is not entitled to possession prior to foreclosure.*

Thus we say, and we submit our contention cannot be disputed, that here the junior mortgagee never at any time, during the period in question, had any right to possession of the mortgaged property or to the rent thereof. Of course, if he had no right to possession he had no right to the rent collected while thus unlawfully in possession.

Appellant contends that the junior mortgagee is entitled to claim the rights of "a mortgagee in possession".

Various definitions as to what constitutes a "mortgagee in possession" may be found amongst the cases and texts. However, the definitions are in agreement in this respect, namely, that the possession of the mortgagee must have been obtained in some legal or lawful manner. In other words, an unlawful possession, viz.: one not based upon any legal right to possession, is not sufficient to entitle a mortgagee to claim rights under this doctrine. In considering the doctrine it is necessary that lawful or legal possession be distinguished from mere physical possession. Mere physical possession without the right to possession is unlawful and, of course, constitutes a trespass. That is to say, possession gained in any manner excepting where the mortgagee had or thereby acquired the right to possession would of necessity be a wrongful or unlawful possession and one not sufficient within the meaning of this rule.

While the junior mortgagee in our case had physical possession, nevertheless his possession was clearly wrongful and unlawful, as not founded upon any right to possession, he having acquired no such right either under the mortgage itself or through any judicial proceeding. The junior mortgagee, therefore, cannot claim the rights of a mortgagee in possession. Andrew, the junior mortgagee, testified that he took advantage of a temporary vacancy of the property and simply went upon the property and commenced to operate the same, no one being there present to oppose him. He testified that he went to the property "to see what was doing and found same inactive". (Record, page 38.) He further testified that he did not ask for the consent of the mortgagor before going into actual possession, nor did he advise or notify the mortgagor of what he intended doing. (Record, page 39.) His entry into possession and his subsequent operation of the property constituted a continuing and unlawful trespass, and, as the cases will demonstrate, the mortgagor could at any time have maintained ejectment proceedings against the junior mortgagee.

We have stated that the junior mortgagee went into possession and continued therein entirely without right. The mortgage itself gave him no such right to enter or right to possession; and it is submitted that under the statutory law of California, a mortgagee can neither have nor acquire any right to possession, which might constitute as lawful an otherwise unlawful entry, unless and until he obtains such right by judicial decree in a foreclosure proceeding or unless he be given such rights either by agreement with

the mortgagor expressed in the mortgage, or by consent, either express or implied, thereafter given by the mortgagor.

Section 744 of our *Code of Civil Procedure* quite plainly and concisely provides that a mortgagee cannot lawfully acquire possession without a foreclosure proceeding having been instituted. Said section reads:

> "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

The case of *Nelson v. Bowen,* 124 Cal. App. 662, is cited in appellant's brief. In reality the case supports our position most strongly. When analyzed, it will be noticed that that case was decided entirely on the theory that consent of the mortgagor, either express or implied, was essential in order to constitute a mortgagee in possession. In that case the Court expressly found that the mortgagee had obtained actual possession with the consent of the mortgagor. The mortgagor had voluntarily surrendered up possession of the mortgagee. *If the mortgagor's consent were not necessary, as appellant contends, why should the Court in the Nelson case, supra, have devoted so much consideration and space to a discussion of whether or not the mortgagor's consent had there been given?* In determining what constituted a mortgagee in possession, the Court in the *Nelson* case, plainly expressed their views, which are in support of our contentions and opposed to appellant's, as follows, at page 671:

"The cases cited by the appellant to the effect that an ordinary real estate mortgage gives to the mortgagee no right to the possession of the land, and creates no lien upon, or right to the crops growing and unsevered thereon, correctly states the law as we understand it. * * *

In *Freeman v. Campbell,* 109 Cal. 360, 42 Pac. 35, one of the cases relied upon by the appellant, a distinction was drawn between a mortgagee in possession and one not in possession. *The mortgagee in possession as defined in that case is one who has gone into possession with the consent of the mortgagor.* This, as shown by the authorities which we have cited, may be either express or implied, * * *" (Italics ours.)

And again, at page 670, the Court said:

"As to what constitutes a mortgagee in possession further appears in 17 California Jurisprudence, page 1016, and need not be further elaborated upon herein. The mortgagee who enters and takes possession of the mortgaged premises, cultivates, cares for and harvests the crops thereon, and markets the same *with the consent of the mortgagor,* entitles the mortgagee to deduct from the rents and profits received, all the expenses necessarily incurred in the cultivation, caring for and harvesting of the crops." (Italics ours.)

The principles we are contending for, namely, that consent of the mortgagor is necessary to entitle the mortgagee to any possessory rights, are plainly stated in Section 2927 of the *Civil Code,* which reads:

"*Mortgage does not entitle mortgagee to possession.* A mortgage does not entitle the mort-

> gagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage the mortgagor may agree (consent) to such change of possession without a new consideration." (Insertion ours.)

We submit that the junior mortgagee in the instant case quite obviously took possession unlawfully, namely, contrary to the express provisions of the two California statutes aforesaid, and for that reason under none of the definitions of a "mortgagee in possession" which have come to our attention can the junior mortgagee be considered as coming within said classification.

In fact, it strikes us that appellant has conceded our contentions by the statement appearing near the concluding portion of their argument upon this topic (Appellant's Brief, page 23), for they there say:

> "It will be found in every case, however, that the expression (mortgagee in possession) means no more than that the mortgagee is not entitled to retain possession if he acquired it *over the mortgagor's objection,* or by fraud, duress, *or other wrongful acts."* (Insertion and italics ours.)

We have demonstrated that the junior mortgagee entered into the physical possession of the property, and thereafter maintained the same, without any right thereto. Necessarily, by doing this he became a trespasser. In other words, he entered by means of a trespass which must concededly constitute a "wrongful act" within the meaning of the cases. If he en-

tered without right, which we have shown was the case, he must necessarily have entered wrongfully. There is no other possible alternative. Thus we find that appellant has hung itself, so to speak, by its own concessions.

While it may be possible to find an isolated case or so which might indicate that the mortgagor's consent is not a necessary requirement, in every such case it will be found, we submit, that such case was either decided in a jurisdiction wherein the common law prevailed and statutes similar to the aforesaid California code sections were not in force, or the Court decided such case by failing to take such statutes into consideration.

It is impossible to reconcile the case of *Burns v. Hiatt,* 149 Cal. 617, cited by appellant, with said code sections, and it is quite obvious that the Court overlooked them entirely in deciding that case contrary to the express provisions of said code sections which, as we have shown, clearly make necessary the mortgagor's consent to any *rightful* taking of possession by the mortgagee. Colorado has a code section identical in terms with Section 744 of the California *Code of Civil Procedure.* In fact, as was pointed out by the Colorado Supreme Court in *Moncrieff v. Hare,* 87 Pac. 1082, 7 L. R. A. (N. S.) 1001, 1012, the Colorado code section (Section 261 of the Colorado Code of Civil Procedure) is an exact copy of this California statute. The Court in that case held the particular statute to have the following effect as regards the right of possession under a mortgage at page 1008, viz.:

> "It is familiar learning that at common law a mortgage vests the legal title in the mortgagee, and upon condition broken the mortgagee might re-enter or bring ejectment. Our statute, however, has taken from the instrument its common-law character, and deprived the mortgagee of all possession, or right of possession, either before or after condition broken; and before this right exists the mortgagee must foreclose his mortgage, and sell the mortgaged property."

In *Lewis v. Hamilton,* 26 Colo. 263, 58 Pac. 196, 197, the Colorado Court, again recognizing the effect of the statute in question, held that, as is clearly set forth in the statute, the mortgagor remains entitled to retain possession until deprived of such right in a valid foreclosure proceeding. More particularly, and diametrically opposed to the language of the Court in *Burns v. Hiatt,* supra, the Colorado Supreme Court held that possession obtained by a mortgagee under a void foreclosure is not sufficient to constitute him a mortgagee in possession or to permit the mortgagee to claim any rights under that doctrine, and that the mortgagor in such case was entitled to have possession restored to him. Obviously this is the only proper legal conclusion. Inasmuch as a mortgagor in our State is given the right of possession by express statutory provisions, it is absolutely inconceivable that he could be deprived of such rights by or through a void foreclosure proceeding. A proceeding which is void cannot possibly impair, affect or cut off rights in such fashion. A void foreclosure proceeding could have no such effect, and the right to possession would still remain in the mortgagor thereafter. Principles

of jurisprudence, too well settled to require citation of authority, permit of no other conclusion.

Opposing counsel cite a leading authority on the subject, namely, *Jones on Mortgages* (8th ed.), Volume 2, page 219, wherein the author, clearly recognizing that the possession necessary to entitle a mortgagee to claim any rights under the doctrine must be a "legal" possession, as distinguished from a mere physical possession unsupported by any legal right, says:

> "To be *legal*, the possession must have been taken in good faith, free from deceit, fraud, *or wrong, and without violation of any contract relation with the mortgagor.*" (Italics ours.)

Under familiar fixed principles of construction, it must be conceded that the California code sections must be considered as part of the junior mortgagee's mortgage contract, inasmuch as there were no provisions in the mortgage in question to the contrary; that is, no provisions whereby the mortgagor had consented in advance to the mortgagee taking possession in the event of default. Such being the case, it is clear that the instant situation does not disclose any legal possession in the junior mortgagee within the principle announced in the text last quoted, because, as we have pointed out, the junior mortgagee's possession and operation of the property constituted a continuing trespass,—clearly a "wrong" within the meaning of said text. It, moreover, constituted a "violation of * * * contract relation with the mortgagor", namely, the mortgage of which the existing statutes above mentioned must be considered a part.

Opposing counsel failed to refer to a further and more pertinent discussion of this subject as expressed at page 222 of *Jones on Mortgages,* supra. Expressly referring to the effect of statutes similar or identical to our code section, Jones there states:

> "*Where mortgagor is given right to possession by statute.* In a few states, however, by virtue of peculiar provisions of statute, the mortgagor may recover possession from the mortgagee at any time before his rights have in some manner been foreclosed. *If he goes into possession without permission of the mortgagor he may be removed by suit in ejectment.*" (Italics ours.)

The Colorado case, *Lewis v. Hamilton,* supra, is cited in support of this portion of the text, and, as we have pointed out, the Colorado statute is a copy of the California code section.

Other states are in accord with these principles. For example, in *Newport v. Douglas,* 12 Bush (Ky.) 673, the Court held that:

> "A mortgagee, not having the absolute right to possession of the mortgaged property, does not have the right to the rents and profits, but must secure such incidents by express contract, and if he fails to do so, he must reach them through proceedings in equity."

Another case properly holding that possession obtained through a void receivership is not sufficient is *Empire Trust Co. v. Kermacoe Realty Co.,* 266 N. Y. S. 685, 686, decided in 1933. In that case a receiver appointed at the instance of a mortgagee collected rents and profits. Thereafter his appointment was

vacated as having been invalid and the Court compelled the receiver to pay over the rents so collected to the mortgagor against the objection of the mortgagee. The decision reads as follows:

> "The assignment of rents (which was contained as a clause in the mortgage itself), as in the case cited, constituted security for the payment of the mortgage indebtedness. Until the plaintiff actually possessed itself of the rents, or obtained them through a receiver appointed upon its application, *the rents remained the property of the owner of the fee.* Although a receiver was (on motion of the plaintiff) appointed, the appointment was subsequently vacated as invalid, and *the plaintiff's rights must be determined on the assumption that there was no receivership.* Indeed, both the order vacating the appointment of the receiver and the order of the Appellate Division affirming that order and striking out the provision in the order reappointing the receiver which sought to give his reappointment retroactive effect would be without point if the mortgagee upon whose application the receiver was named were held to be entitled to the rents collected under the void receivership." (Italics ours.)

We have heretofore pointed out that the junior mortgagee in our case obtained physical possession by simply taking advantage of a temporary vacancy of the premises, without the knowledge of the mortgagor. In a similar situation the New York Court in *Hermann v. Cabinet Land Co.,* 112 N. E. 476, 477, expressed itself as follows:

"But in a case like this, where the owners of the equity of redemption have not been served and they are complaining, it would be unjust to say that their only remedy against the purchaser is an action for an accounting and for permission to redeem the premises from the mortgage. *If that were the law, the mortgagee in most cases would only have to await a time when the mortgaged premises were temporarily unoccupied and enter peacefully thereon, and the mortgagor would then be limited to an action to redeem with all the burden of attack and of proof resting upon him.* No case cited by the defendant from the courts of this State goes to the extent of so holding." (Italics ours.)

Also, that Court stated:

"In that case, the owners of the equity of redemption were not made parties to a suit in foreclosure, and the judgment against them was enforced by a writ of assistance which put the mortgagee in possession. *The court held that the possession of the mortgagee was without lawful authority and amounted to a trespass. Deutsch v. Haab,* 135 App. Div. 756, 119 N. Y. Supp. 911, is to the same effect." (Italics ours.)

The Texas Court viewed the situation in similar fashion in *Galloway v. Kerr,* 63 S. W. 180, 185 (Tex. Civ. App.). In that case, the mortgagor had temporarily left the premises vacant. The mortgagee, taking advantage of this, took physical possession and put a tenant upon the premises without seeking or obtaining the mortgagor's consent thereto. The mortgagor sued to recover the possession, and the Court held in his favor, saying:

> "* * * A mortgage is not a conveyance of the fee, but a mere security for debt, and * * * the legal title and right of possession do not pass to the mortgagee. *The possession of the mortgaged premises by the mortgagee without the consent of the mortgagor or a foreclosure of the mortgage is wrongful,* and it is not necessary for the mortgagor to pay the debt in order to recover possession of the premises." (Italics ours.)

That Court furthermore held:

> "Rightful possession can not be inferred from failure of the mortgagor to take steps to regain possession after wrongful entry of the mortgagee."

Clearly indicating that a distinction must be made between mere physical possession and lawful possession, and effect given to such distinction, is *Gustin v. Crockett,* 44 Wash. 536, 87 Pac. 839. In that case the mortgagee obtained possession by means of void process in an ejectment suit. The mortgagor brought the present action to recover possession and the defendant mortgagee defended by claiming to be a "mortgagee in possession". The Court held in favor of the mortgagor, properly deciding that the defendant mortgagee was not entitled to claim the rights of a mortgagee in possession, the Court saying:

> "It is true * * * that respondents (mortgagees) were in *actual* possession when suit was begun, but the facts alleged with reference to their possession do not show they are mortgagees in possession. * * * The elements which estab-

lished the rights of a mortgagee in possession do not therefore exist here." (Italics ours.)

We submit that the "element" referred to by the Court which must necessarily be present in order to permit a mortgagee to claim rights under this doctrine, obviously is the consent of the mortgagor.

If *Burns v. Hiatt,* supra, the case cited by opposing counsel, announced the law as it may ever have stood in California, it is clear that this case has been overruled by later cases and is no longer the law. We refer particularly to the *Snyder* case, supra, decided by the California Supreme Court in October of 1934. After referring to certain California Code sections, including those herein cited, and recognizing the effect thereof, and after pointing out that a trust deed and a mortgage are treated as similar in this State that Court, in an exceedingly well reasoned opinion held, at pages 701-702, as follows:

> "The right to possession does not pass to the trustee or the beneficiary under a trust deed in the absence of a special agreement. (*Meadows v. Snyder,* 209 Cal. 270; 286 Pac. 1012; 25 Cal. Jur. 41, 42; 41 Cor. Jur. 609, sec. 575). We must apply, therefore, the same rules as to the rights of the trustee or the beneficiary to possession of the premises *as are applicable by statute* in the case of a mortgagee, *whose rights to possession, whether before or after default, are controlled by the agreement, or the consent otherwise of the mortgagor, express or implied.* (Civ. Code sec. 2927; *Meadows v. Snyder,* supra; *Cameron v. Ah Quong,* 175 Cal. 377, 165 Pac. 961; *Dutton v. Warschauer,* 21 Cal. 609; 17 Cal. Jur. 1020-

> 1022; 1 Jones on Mortgages, 8th ed. sec. 22). Where a mortgagee, and likewise a trustee or beneficiary under a trust deed, wrongfully ousts the one entitled to possession, he is liable as a disseisor. (19 R. C. L. 316; *Meadows v. Snyder,* supra)." (Italics ours.)

This holding, representing the last word of the California Supreme Court, constitutes the complete answer to appellant's contention that the mortgagor's consent is an immaterial element in the doctrine of mortgagee in possession. That Court plainly said that such consent is the controlling feature under the doctrine and indicated that such consent must be acquired in either one of two possible ways, viz: "by (1) the agreement, or (2) the *consent otherwise* of the mortgagor express or implied".

An earlier case, but one which is oft cited as a leading case, is *Freeman v. Campbell,* 109 Cal. 360, 363. In that case the mortgagee took physical possession without the mortgagor's consent and thereafter collected certain rents. The mortgagor sued to recover the rents thus received, and the Supreme Court affirmed a judgment in favor of the mortgagor for the recovery of said rents. Clearly indicating that consent is necessary to entitle the mortgagee to collect and retain rent, the Court stated as follows:

> "The taking possession of the land by Campbell after the death of Anderson was not by virtue of any agreement between them, *and consequently conferred no additional right upon him as mortgagee.* * * * The present action is not brought to recover the rents and profits as dam-

> ages for the withholding of the land by Campbell, but for monies had and received by him to the use of the plaintiff. Their receipt by him constituted a transaction as independent of the mortgage as would have been the receipt by him of any other monies belonging to the estate of Anderson; *and, as they were taken by him without any authority from Anderson, (the deceased mortgagor), and without the implied power of a 'mortgagee in possession' to apply them in reduction of the mortgage debt, he had no right, without the permission of the plaintiff, to make such application.* * * *" (Italics ours.)

The foregoing authorities conclusively establish, we submit, that a mortgagee cannot acquire the right to possession except through foreclosure proceeding had *against the mortgagor as a necessary party, or with the consent, express or implied, of the mortgagor*. Stated differently, the cases establish that the right to possession remains in the mortgagor unless and until wrested from him by Court proceeding in the nature of a foreclosure, to which the mortgagor must necessarily be made a party, or unless the mortgagor voluntarily gives up such right either by an agreement contained in the mortgage or by consent in some other form, express or implied.

Since the junior mortgagee never at any time or in any manner acquired the right of possession he acquired no lawful right to the monies in dispute but the right thereto remained and still remains in the mortgagor; and since the junior mortgagee obtained no right to said money, the senior mortgagee can claim no derivative right thereto inasmuch as

there was no right in the junior mortgagee upon which to base such derivative rights. And since the senior mortgagee never attempted to obtain the right of possession in the manner expressly required by the terms and conditions of the deed of trust or in any other manner which can be considered as effective as against the mortgagor, the senior mortgagee never acquired the right to possession or any right to the monies in question.

In passing we wish to point out and stress the fact that although the appellant did finally obtain actual possession of the mortgaged premises, when such possession was surrendered to it by Andrews on August 12, 1933 (Record, page 77) this did not take place until after all of the moneys in dispute had already been collected by Andrews.

Next we shall consider appellant's contention to the effect that the lower Court's finding that the junior mortgagee took possession without the consent of the mortgagor (Record, page 87), is allegedly not sustained by the evidence.

(3) The finding that the junior mortgagee took possession without consent, express or implied, is amply supported by the evidence.

As a preface to our discussion of the finding in question, we here point out the familiar principle that all presumptions and intendments must be indulged in by an Appellate Court in favor of the validity of the findings. The burden is always on the appellant to demonstrate that any particular finding is unsupported by evidence.

Merrill v. L. A. Cotton Mills, Inc., 120 Cal. App. 149, 162.

We submit that appellant has utterly failed to carry the aforesaid burden or to point out wherein the evidence is insufficient. On the contrary, a consideration of the evidence shows it to be amply sufficient to support the finding that the junior mortgagee (Andrews, as trustee in bankruptcy) took possession without the mortgagor's consent. No circumstance of any kind is disclosed in the record from which such consent might be implied; and we do not understand that appellant goes so far as to contend that any express consent was furnished. Appellant's position, as we understand it, is one where it is contending that mere silence on the part of the mortgagor allegedly constituted consent. No affirmative action has been pointed out as constituting any alleged consent. Appellant apparently relies on inaction rather than on any affirmative action of the mortgagor.

The record shows (Record, pages 38-39) that the junior mortgagee went to the Diamond Range and, finding the same vacant and inactive, thereupon taking advantage of such vacancy, entered upon and thereby acquired the physical possession of the property. Andrews up to that point had not sought or obtained the consent of the mortgagor, nor did he notify the mortgagor of his intentions in this respect. So far as appears the mortgagor had no knowledge of the intentions or actions of the junior mortgagee. The situation thus far was wholly one of inaction on the part of the mortgagor.

Some time thereafter Andrews, according to his testimony, purely by coincidence met upon the street

and there spoke with a Mr. William C. Crittenden who was an officer of the mortgagor corporation. During this conversation Andrews told Crittenden that he proposed "to take possession of the 'Diamond Range'" (Record page 40) and Crittenden offered no objection to his so doing. As a matter of fact, according to the record, Andrews had already taken physical possession prior to his conversation with Crittenden. Andrews in testifying, admitted that he did not know whether or not Crittenden was an officer of the mortgagor corporation. Inasmuch as this meeting and conversation between Andrews and Crittenden was admittedly purely casual and by accident, and since Andrews did not even know that Crittenden was an officer, it is obvious that Andrews was not then or thereby seeking to obtain the consent of the mortgagor. As pointed out, he, as a matter of fact, had already taken possession of the property without consent. It should be quite obvious, we submit, that Andrews was not in the slightest interested whether he had consent or not. It was obviously immaterial to Andrews whether or not he obtained the mortgagor's consent and it is equally obvious he had chosen to disregard the mortgagor entirely as far as his operating the property was concerned. We submit that a finding of consent, either express or implied, could not properly be based on so tenuous a circumstance as the mere passing conversation in question.

It is an admitted fact in this case that the minutes of the mortgagor corporation are wholly silent and

fail to show that any action was taken by its board of directors with reference to approving or consenting to the action of the junior mortgagee in taking possession. (Record page 42.) In fact, in claiming to have taken possession of the property with the consent of the mortgagor, the junior mortgagee conceded that it relied solely on the momentary conversation had between Andrews and Crittenden. (Record page 39.)

Although Crittenden was an officer of the mortgagor corporation, there was no showing made that he had authority to consent to possession being taken or held by the junior mortgagee. The burden of making such a showing, in order to bind the corporation, was and is upon the appellant in this case, who is thus seeking to take advantage of and rely upon these matters. Where a mortgagee attempts to claim possessory rights against a mortgagor who is asserting contrary rights, the burden is on the mortgagee to justify its action in seizing possession.

Snyder v. Western Loan & Building Co., supra, p. 702.

The Diamond Range was presumably a valuable asset of the corporation, possibly its sole asset. The right to possession thereof which, according to the aforesaid code sections, still remained in the mortgagor corporation, likewise constituted a valuable asset as is demonstrated by the very fact that Andrews accumulated monies from the operation of the property. Under well settled and fundamental principles of corporation law, an officer of a corporation

has no power or authority, merely by virtue of his office, to bind the corporation or to dispose of its assets, particularly capital assets, excepting and to the extent as such power may have been conferred upon him by the stockholders or board of directors. No claim can be made that the alleged transaction took place in the ordinary course of business of the corporation. No contention is made that Andrews paid any consideration to the corporation in exchange for the alleged right to possession, and certainly an officer cannot bind a corporation by attempting to make a voluntary gift of a valuable corporate asset.

Black v. Harrison Home Co., 155 Cal. 121;
Grummett v. Fresno Glazed Cement Pipe Co., 181 Cal. 509;
Alta Silver Mining Co. v. Alta Placer Mining Co., 78 Cal. 629.

It is to be further noted that at the time of the conversation between Andrews and Crittenden, the capital stock of the mortgagor corporation was the subject of a trust indenture executed in favor of Pacific National Bank, as Trustee, and that during the month of September 1932, which was the time when Andrews acquired physical possession, the said Pacific National Bank came into possession of all of the outstanding capital stock of the mortgagor corporation, and officers of the Pacific National Bank were regularly substituted for and as officers of said mortgagor corporation, Crittenden thereupon ceasing to be an officer thereof. (Record page 41.) *Shortly thereafter a representative of Pacific National Bank*

advised the junior mortgagee that his possession of the property was illegal. (Record page 41.) In view of this circumstance, we submit that not only did Andrews take possession without the consent of the mortgagor but actually the case must be considered as one where the mortgagee gained physical possession *against the consent* of the mortgagor. As further showing that not only did the mortgagor fail to give consent, either express or implied, but moreover objected affirmatively to Andrew's possession, is the fact that the mortgagor served a written demand upon Andrews to the funds derived by Andrews from his possession of the property. (Record page 19.)

(4) There is no basis upon which appellant can insist upon the payment of taxes.

A reading of appellant's brief puts us in mind of a retreating army, which, realizing that defeat is inevitable, momentarily falls back from one supposed stronghold to another, merely hoping to postpone the fatal moment. Appellant commenced by claiming *all* of the monies in the hands of the junior mortgagee representing the proceeds of his operations for the entire period. Thereupon, quickly realizing the futility of this claim appellant retracted somewhat, indicating it would be satisfied to receive the proceeds which accrued subsequent to the time appellant petitioned for sequestration. As has been pointed out, appellant thus released its claim to $658.66, a portion of the fund. Down to this point appellant's claim to the monies has been a broad, general one based upon the doctrine of "mortgagee in possession". Now, however, in con-

tending that the Court erred in not directing the payment of taxes out of the rents and profits, the appellant seems content to stand upon a much narrower ground, merely contending that it would be "improper and inequitable to permit the revenues from the property to be turned over to the owner of the property".

The total unpaid taxes amount to $11,147.84, *of which total amount only the sum of $2856.86 represents the taxes which accrued while the junior mortgagee was operating the property.* (Record page 90.) The remainder of said total sum represent the taxes which had accrued and become delinquent prior to the time Andrews went upon the property and commenced to operate it.

Appellant, at page 25 of its brief, after referring particularly to the taxes in the aforesaid smaller amount, namely, the taxes which accrued during the operations in question, asserts that the taxes of this last mentioned class should be considered as an operating charge, and thereupon puts forth the contention that it would be inequitable for the Court to permit Andrews to pay over the rents and profits to the mortgagor-owner until such accruing taxes had been paid.

In considering this last contention of appellant, we wish to point out and to stress the fact *that none of these taxes, either accrued or delinquent, were ever actually paid out by the junior mortgagee.* (Appellant's Brief, page 24.) This is a very important factor, for the reason that while the junior mortgagee is undoubtedly entitled to deduct from the gross rentals received by him, such amounts as he actually paid out

or became individually liable for, certainly, under no possible theory could he deduct for any items which had not been actually paid or personally incurred by him in the course of his operations. Thus, if Andrews had actually paid out any monies for taxes it may well be that he could claim reimbursement for amounts actually so paid out or could insist on being indemnified or protected against any liability he might have personally so incurred. However this may be, the fact remains he did not pay any taxes whatever, he incurred no personal liability therefor, nor was he under any duty, either to the mortgagor or to the appellant as senior mortgagee, to pay or see to the payment of any taxes. (41 C. J., Sec. 623, page 641.)

In each of the two cases cited by appellant in connection with its claim concerning taxes, the taxes had *actually* been advanced and paid out by the person in possession (who were receivers appointed in the course of foreclosure proceedings). Both of these cases are, therefore, readily distinguishable. They stand for the proposition, merely, that where taxes are actually and in fact paid out, they can be deducted. As just pointed out, this principle is not involved in our case.

We have no hesitancy in asserting that there is no basis, legal or equitable, upon which appellant can require the payment of these unpaid taxes. Clearly, the delinquent taxes cannot be considered as an operating charge, nor can the accruing taxes be so considered inasmuch as they were not paid in fact.

In thus attempting to compel the payment of taxes, appellant in reality is attempting to direct the disposi-

tion of a fund to which, as the lower Court has found, appellant has no claim and in which it has no right or interest. If appellant owned the whole or any part of these rent monies, naturally, as such owner, it could direct and compel the disposition of the monies. Inasmuch as the mortgagor, as heretofore pointed out, was not bound by the sequestration proceedings since it was not a party thereto, it is not bound by the purported order of sequestration, much less by the portion thereof purporting to direct the payment of taxes. *That order had no more effect upon the mortgagor, or upon the funds to which the mortgagor is entitled, than would an attempted assignment by the appellant of monies in which it had no right, title or interest.*

If the appellant itself had paid the taxes on the mortgaged property, it could have claimed reimbursement therefor from the mortgagor. The mortgage so provides. But the mortgagor's right to reimbursement in such event would have had to be enforced by and through the mortgage itself. In other words, the mortgagor's obligation to reimburse the mortgagee for taxes paid in such case would simply have stood on the same footing as any other obligation for which the mortgage constituted security. A mortgagee, in such case, could no more insist upon the mortgagor reimbursing him for taxes out of any particular rents or profits than he could insist on the payment, out of particular income, of interest or principal or any other obligation secured by the mortgage. While a mortgagor may be under a duty to pay taxes, his duty extends no further, and he is under no duty to apply any

particular rents or profits to the payment of taxes. (41 *C. J.*, page 639.) Taxes paid by a mortgagee simply increases the amount due under and secured by the mortgage.

CONCLUSION.

Appellant has seen fit to conclude its argument by asserting it would be unfair to appellant to permit the mortgagor to receive the rents and profits in dispute unless and until the mortgaged property, of which the appellant has now taken possession, were first freed from the lien of these taxes. As we view this case, appellant has no ground whatsoever upon which to complain in this fashion. Several possible remedies, any one of which would have been fully adequate to protect appellant and enforce any and all rights it might have had, were readily available to it at the time it first attempted to enforce its rights by means of the sequestration proceedings. By but very slight additional effort on its part, appellant could have obtained full and complete relief in these very same sequestration proceedings, for appellant would simply have had to promptly join the mortgagor as a party to those proceedings, in order to bind it thereby, by obtaining the issuance of an order to show cause upon its petition for sequestration and serving the same upon the mortgagor. Instead of so doing, appellant, voluntarily and of its own free will, chose to entirely ignore the mortgagor in those proceedings and was wholly content to stand by and rely upon the junior

mortgagee to take such necessary steps and summon in the mortgagor which, unfortunately for the mortgagor, came too late to affect the monies in question.

Thus, as far as the mortgagor is concerned, the appellant cannot complain of results which arose entirely and solely through appellant's own fault. Appellant has no one but itself to blame for the position in which it now thus finds itself.

It is therefore submitted that the order appealed from must be affirmed in its entirety, as to the whole of the monies now in the hands of Frank T. Andrews, as trustee in bankruptcy of Alexandria Hotel Realty Corporation, bankrupt, namely the sum of $4359.03.

Dated, San Francisco,
May 31, 1935.

Respectfully submitted,
FRED S. HERRINGTON,
Attorney for Appellee, J. O. England, as Trustee in Bankruptcy of Northern Counties Land and Cattle Company (a corporation), Bankrupt.

DINKELSPIEL & DINKELSPIEL,
Attorneys for Appellee, Coast Holding Corporation (a corporation).

NO. 7781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES DEMMERT, for himself and all other taxpayers similarly situated,

Appellant,

vs.

WALSTEIN G. SMITH, as Territorial Treasurer of the Territory of Alaska,

Upon Appeal from the United States District Court for the Territory of Alaska, Division Number One At Juneau

Brief of Appellant in Support Thereof

WILLIAM L. PAUL,
Attorney for Appellant.

Address:
420 Goldstein Building,
Juneau, Alaska.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES DEMMERT, for himself and all other taxpayers similarly situated, *Appellant,* vs. **WALSTEIN G. SMITH, as Territorial Treasurer of the Territory of Alaska,**	**No. 7781**

STATEMENT OF THE CASE

This case is to test the validity of Chapter 65 Session Laws of Alaska, 1929, as amended by Chapter 89 Session Laws of 1933 wherein it is alleged that Indians as a race are excluded in express terms and by necessary implication from the benefits provided therein.

THE AMENDED COMPLAINT

The issue comes before this court on demurrer and hence the allegations of the amended complaint must be taken as true.

and that plaintiff has no plain, speedy or other adequate remedy at law.

THE DEMURRER (R. 10)

The defendant, appellee herein, demurred on four grounds—

1) that the court had no jurisdiction of the person of the defendant or the subject of the action;
2) That the Territory of Alaska, the real party in interest against which the injunction is sought, cannot be sued without its consent;
3) that the plaintiff has no legal capacity to sue;
4) the complaint does not state facts sufficient to constitute a cause of action or to entitle the said plaintiff to the relief, or any relief therein demanded.

The appellee confined his argument (both oral and his brief) to the single point, to wit, that the Territory of Alaska cannot be sued without its consent.

The court sustained the demurer without rendering an opinion.

This appeal is from that judgment sustaining the demurrer and dismissing the complaint. (12-13 R.)

SPECIFICATION OF ERRORS

Appellant contends that the action of the District Court should be reversed because none of the

grounds of demurrer is well taken and that the court erred in sustaining them.

DEMURRERS No. 1 and 2.

1) That the court has no jurisdiction of the person of the defendant or the subject matter of the action;
2) that the Territory of Alaska, the real party in interest against which the injunction is sought, cannot be sued without its consent.

These two grounds constitute but one ground according to our statute (sec. 3416 CLA 1933) and the second is not statutory. However the second demurrer indicates on what the defendant relies, and leads us to the question—

WHO IS THE REAL DEFENDANT?

In the early case of Osborn v. U. S. Bank (22 U.S. 846 to 859), the Supreme Court considered a very similar demurrer presented in this form by the court;

> "We proceed now to the 6th point made by the appellants, which is, that if any case is made in the bill, proper for the interference of a Court of Chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction." * * * The argument was that * * * "The interest of the State is direct and immediate, not consequential. The process of the Court, though not directed against the State by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially,

though not in form, against the State, and the Court ought not to proceed without making the State a party. If this cannot be done, the Court cannot take jurisdiction of the cause.

"The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the State in the suit, as brought, is admitted; and, had it been in the power of the Bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the State was before the Court. But this was not in the power of the Bank. * * * the very difficult question is to be decided, whether, in such a case, the Court may act upon the agents employed by the state, and on the property in their hands." * * * "The plain and obvious answer is, because the jurisdiction of the Court depends, not upon this interest, but upon the actual party on the record. * * *

"This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named." * * *

"But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. * * *

"The State not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

> " * * * It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the state of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted."

On the question then, whether in the exercise of its jurisdiction, the Court ought to make a decree against the defendant Walstein G. Smith, the case of Osborn v. U. S. Bank, supra, is a precedent and is allowed in all cases where the act is ministerial.

> Marbury v. Madison, 1 Cranch 137;
> Kendall v. United States 12 Peters 524;
> The Com. of Patents v. Whiteley 4 Wall. 522;
> Gaines v. Thompson 74 US 347.

It is not necessary here to distinguish between what is a ministerial duty and one charged with discretion beyond referring to an accepted definition of what constitutes a ministerial duty. We take it from Gaines v. Thompson 74 U. S. 352 that

> "A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law."

Can anybody imagine a case that is more simple and definite than that of paying a check or warrant

drawn by a proper authority such as in the case at bar?

The Supreme Court in Osborn v. U. S. Bank, supra, has noted the difficulties that could arise if the rule sought to be established by appellee were the law. And not only in that case but also in the case of Cunningham v. Macon (109 US 447) it laid down the better rule and stated the reason in the following words;—

> "But in the desire to do justice, which in many cases the court can see will be defeated by an unwarranted extension of this principle (that a sovereign may not be sued without its consent), they have in some instances gone a long way in holding the state not to be a necessary party, though some interests of hers may be more or less affected by the decision. In many of these cases the action of the court has been based upon principles whose soundness cannot be disputed. A reference to a few of them may enlighten us in regard to the case now under consideration."

The court then listed three classes of cases wherein jurisdiction would be entertained with the first two of which we are not concerned (1) where property in which the state has an interest, comes before the Court and under its control without being forcibly taken from the possession of the government; (2) where an individual is sued in tort and defends on the ground that he has acted under orders of the government.

The third class is in point and

> "is where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process. Of this class are writs of mandamus to public offices as in the case of Marbury v. Madison, 1 Cranch 137, et al. * * * It has been insisted that in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty with the plaintiff's rights in the premises."

The court then cited the case of Davis v. Gray, 16 Wall. 203, in which the court enjoined the governor of the State of Texas and the Commissioner of the State Land Office from issuing certain deeds not authorized by law.

In Osborn v. U. S. Bank, supra, a preliminary injunction was allowed by the court to restrain a state officer from placing money in the treasury of the State. It was admitted that the real party at interest was the State of Ohio and that Osborn was merely an agent thereof.

The two phases of the question was raised by two

separate actions both founded on the same law, the case of Board of Liquidation v. McComb, 92 US 531, wherein an injunction issued to restrain the Board of Liquidation from issuing that class of bonds in exchange for a class of indebtedness not included within the purview of the statute, and the case of Louisiana v. Jomel, 107 US 711, wherein injunction was refused for lack of jurisdiction.

In the former case, McComb was the owner of some new bonds already issued and sought to prevent an exchange of new bonds for other bonds not included within the purview of the statute. Mr. Justice Bradley rendered the opinion of the Court and laid down the rule and its limitations thus;—

> "The objections to proceeding against state officers by mandamus or injunction are, first, that it is in effect proceeding against the state itself; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done.
>
> A state, without its consent, cannot be sued as an individual; and a court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been settled that where a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it."

In the Jomel case, the owners of the new bonds sought to compel the Auditor of the state and the Treasurer of the state to pay out of the treasury of the state the overdue interest coupons on their bonds, and to enjoin them from paying any part of the taxes collected for that purpose for the ordinary expenses of government. In this they asked that the officers be commanded to pay, out of the moneys in the treasury, the taxes which they maintained had been assessed for the purpose of paying the interest on their bonds, and to pay such sums as had already been diverted from that purpose to others by the officers of the government.

The reason for the opposite conclusions in these two cases which superficially appear to be identical is this—in the former case, the court prohibited certain officers from performing an unlawful act because of the illegality of the directing law whereas in the latter case the court was asked to interfere where the officers were privileged to use their discretion.

It was not the statute that had changed, but the relation of the parties to it. "There was no jurisdiction in the Circuit Court either by mandamus at law, or by a decree in chancery, to take charge of the treasury of the State, and seizing the hands of the auditor and treasurer, to make distribution of the funds in the treasury in the manner which the court might think just." 109 US 456.

The learned Justice then uses the language on which the appellee relied in the court below;—

> "The treasurer of the state is the keeper of the money collected from this tax. * * * He holds them only as agent of the state. If there is any trust the state is the Trustee and unless the state can be sued the trustee cannot be enjoined."

The principle herein expressed was applied in two Alaska cases both decided by the late Judge Reed. In the case of Pacific American Fisheries v. Territory of Alaska and Walstein G. Smith as Treasurer (7 Alaska 149) the injunction was denied and follows the Jomel case. There was no duty on the Treasurer. He was simply there. He "is not authorized to do or perform any act with reference to the enforcement of the penal or other provisions of the acts for the collection of the taxes levied." * * * but "if the action is against W. G. Smith in his individual capacity, or as an agent attempting to enforce an invalid law of the territory, or as an officer attempting to enforce an invalid law of the territory, a different question would arise, and the action would not be dismissed." 7 Alaska 149.

The reverse of this principle was applied by Judge Reed in the case of Wickersham v. Walstein G. Smith, as Treasurer of the Territory wherein Smith was enjoined from expending money not at all different from the case at bar. As in the Wickersham case, so in this case, Mr. Smith has a simple minis-

terial duty to perform involving no discretion whatever, namely, upon the presentation of a warrant drawn by some other proper authority (section 1783 CLA 1933 for the aged and sec. 1821 CLA 1933 for the destitute mothers) appellee Smith as Treasurer has a positive duty that admits of no discretion but to sign and pay the warrant so drawn.

We are asking that the appellee be enjoined from acting under an invalid statute and the Territory is not a necessary party to the action.

DEMURRER NO. 3

"That the plaintiff has no legal capacity to sue."

This point was neither argued by the appellee in the court below nor touched upon in his brief to the court.

In its simplest terms this demurrer means this: May a taxpayer and citizen of Alaska sue to enjoin the payment of money under an invalid statute.

It is clear that such a person may enjoin action on the part of a municipal or state officer.

101 US 601, 609	—Crampton v. Zabriskie;
138 US 389	Brown v. Trousdale;
158 US 456	Calvin v. Jacksonville;
168 US 224, 236	Ogden City v. Armstrong;
253 US 221, 224	Hawke v. Smith.

On the theory that in respect to taxation, a Territory is like a municipality, we would say that the relation of a taxpayer to a territory is the same as

that of a taxpayer to a municipality. In the case of Talbott v. Silver Bow Co., 139 US 438, 445, the Supreme Court said of a territory;—

> "It is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the general government is no more independent than that of a city to the State in which it is situated, and which has given to it its municipal organization. Who would contend, in the absence of express legislative provision therefor, that a bank created by or under the laws of a State, and located and doing business in a city of that State, could claim exemption from municipal taxation upon its property? * * * The only ground on which exemption from such taxation can be based, in the absence of express legislative provision, is that the tax proceeds from a distinct and independent sovereignty. As the reason for the rule of exemption of a national bank from state taxation fails in respect to a bank located in a Territory, the rule also fails."

This is the principle our District Judge had in mind when he took jurisdiction in the case of Wickersham v. Walsten G. Smith, as Treasurer (7 Alaska 538).

This is the rule in all cases where the taxpayer appears against a defendant not having the status of a State.

Talbott v. Silver Bow Co., 139 US 438, 445;
Bradfield v. Roberts; 175 US 292;
Massachusetts v. Mellon 262 US 486;
Wickersham v. Smith 7 Alaska 522;
Crampton v. Zabriskie 101 US 601, 609;
Brown v. Trousdale 138 US 389.

There were two phases of the Bradfield v. Roberts case going to the court's jurisdiction, (1) did the court have jurisdiction as to the defendant Roberts, the treasurer of the United States; (2) did the court have jurisdiction in a case where the capacity of the plaintiff to sue as a taxpayer was raised. In both issues the court took jurisdiction.

But in some jurisdictions (state of Washington for example) the plaintiff would not have a capacity to sue the State he being interested merely as a taxpayer. The reason is that the statutes charge the attorney general with that duty.

> "To prevent just such results (the possibility of suits by private citizens) and to protect the interests of the public the statute has provided for the election by the taxpayers of an officer—the attorney general—who is especially clothed with authority to institute proceedings of this kind * * * that it is his duty among other things 'to enforce the proper application of funds appropriated to the public institutions of the Territory'." Jones v. Reed 27 Pac. 1067-1069.

This is not true in Alaska. We find the statute thus—

"Whenever the constitutionality or validity of any statute is seriously in doubt, and the enforcement of such statute affects the Territory of a considerable portion of its people or important industries therein, suits or actions may by the Attorney General be instituted in the name of the Territory in any court to determine the constitutionality or validity of such law. And such proceeding may be had for that purpose either by means of suits to restrain, or by means of action to compel, the enforcement of such law, or by any other appropriate proceeding that will bring the question at issue fairly before the court. Or, the Attorney General may for such purpose institute or defend actions or suits for private individuals or corporations, and at the expense of the Territory, whenever the importance of the questions involved to the inhabitants of the Territory shall warrant it; but no such proceeding shall be instituted or maintained in the name of the Territory or at its expense except with the approval of the Governor, Auditor and Treasurer or any two of them in the manner hereinafter provided." Section 666 C. L. A. 1933.

The Attorney General by his demurrer says we have no case and defends the constitutionality of the statute. Even if he were of the opinion that the statute is unconstitutional, the foregoing law places no duty on him for it is merely permissive and not mandatory. And even if he believe the law unconstitutional, he must abide the action of a controlling board as follows;—

"When in the opinion of the Governor, the Auditor and the Treasurer, or any two of them, it shall be for the best interest of the people of the Territory, or the Territory itself, to commence any action, hearing or other proceeding before any court, tribunal, board or commission, or any other authority, they shall so direct the Attorney General under the hand of the Governor, and the Attorney General shall proceed as directed, if in his opinion the action or proceeding can be prosecuted with success. If his opinion is adverse to such action he shall set forth the reasons for the same and embody his opinion and the correspondence in regard thereto, in his biennial report to the legislature." Sec. 667 CLA 1933.

This is quite different from the case of Jones v. Reed, 27 Pac. 1069, where the Court pointed out that the Attorney General even while Washington was a territory was charged with the duty "to enforce the proper application of funds appropriated to the public institutions of the territory."

The nearest approach to this in Alaska is found in section 662 Compiled Laws of Alaska, 1933, where the attorney general has the duty to make "recovery of money illegally paid or property converted."

DEMURRER NO. 4

The fourth demurrer is "That the complaint does not state facts sufficient to constitute a cause of action or to entitle the said Plaintiff to the relief, or any relief therein demanded."

This ground too was neither argued by the defendant nor included in his brief submitted to the court, and we think it should be dismissed under our rule—

> "The demurrer shall distinctly specify the grounds of objection to the complaint; unless it does so it may be disregarded. It may be taken to the whole complaint or to any of the alleged cause of action stated therein." Sec. 3416 CLA 1933.

This statute was taken from the Oregon laws which was interpreted by their Supreme Court thus—

> "The object of the legislature in requiring the demurrer to state the grounds of objection to the complaint was to give the opposite party notice of the alleged defect. * * * It can never be upheld as an orderly proceeding in a court, while trying an issue of law, to find upon that issue in favor of one party, and to hold that there were other reasons, not involved in the issue, why judgment should be rendered against him." Marx et al v. Croisan 21 Pac. 310.

The same demurrers were filed against the original complaint and were sustained in the same manner there being no notice whatever to appellant as to the alleged defect in the complaint, nor was there any indication if all the grounds were good or if but one.

Appellant left to his own devices attempted to

cure whatever objection the District Court might have had and filed his amended complaint but to no purpose. His request for enlightenment from a bench which had formed its opinion was met with a repetition "The demurrer is sustained." Whether there is a defect on this fourth ground or on the preceding grounds, appellant does not know and not even the respectful citation of the Oregon decision was sufficient to secure from the District Judge what this appellant thinks was his due.

Proceeding on the theory that it was this last demurrer that caused the district judge to sustain the demurrer, appellant will now give it his attention.

The complaint alleges discrimination.

The fact of discrimination is apparent on the face of the law. The Governor may grant relief to the mother of any child under 16 years of age except to native (meaning Indian) children who are eligible for provision by the Department of the Interior—sec. 26 ch. 46 SLA 1933. It is not a question of excluding native children who are provided for by some other agency. It excludes native children only who might be the recipients of the bounty of another agency. Should the legislature not have been satisfied with the law as it was without the exception? Would it not be understood that if anybody, whether native or white, were the recipients of aid by any agency, governmental or otherwise, that

such a person would not qualify except to the extent that the "need" existed by "clear and convincing evidence." That is the force of section 28 ch. 46 SLA 1923. However the prejudice or the greed of politicians was not satisfied with that situation for under the language of section 28 which was formerly the language of section 26, Indian widows were getting help from the Territory. And so the language was change in 1933 so that it is provided that if the mother of any native child who was eligible for provision, whether provision was a fact or not, whether it was sufficient or not, that mother was outside the pale of Territorial aid from a fund supported by general taxation.

The legislature even then was afraid that the language of this exclusion might contain a loop hole and since many of them maintain that the Indians of Alaska are wards of the federal government, they caused the legislature to add these words (sec. 28) "or to any ward of the Government of the United States."

There has been no change in the policy of the legislature. When the so-called "Widow's pension act" was first passed (ch. 44 SLA 1923) the language was this—"That the mother of any white child" alone was eligible. The word "white" was stricken by chapter 67 of the Session Laws of 1925 at which time the legislature limited the act thus—"except the native Indian children of the Territory who are

provided for by the Department of the Interior out of funds of the Treasury of the United States."

Likewise in providing pensions for the aged destitute people of Alaska, the legislature by chapter 65 Session Laws of 1925 enacted the exclusion now found in section 28 of chapter 65 Session Laws of 1929 and now forming section 1823 Compiled Laws for 1933—viz., This Act shall not inure to the benefit of any Indian or Eskimo resident of the Territory who is provided for by the Department of the Interior out of the funds of the Treasury of the United States or to any ward of the Government of the United States.

This amendment replaced the more obvious discrimination against the Indian race in the law, viz.; "That the term 'resident' as used in this Act shall not be construed to include any native or other Indian" sec. 8 ch. 46 SLA 1923.

These laws of the Territory are all in violation of the Bill of Rights reenacted so that its terms would include the Territories of the United States by sections 41 of Title 8 United States Code in the following language;—

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to

like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other."

Shall we allow the Territory of Alaska to say that Natives a term by which Indians are always designated in Alaska shall not have the benefit of this statute? Or is there any sophistry by which the discrimination which exists in fact as charged in the complaint and admitted by the demurrer might be perpetuated?

"These laws were intended to secure political and legal equality to all citizens, but were not intended to establish social equality or to enforce social intercourse between different classes of citizens" (Fed. Cas. No. 18, 258,) and "to forbid the execution of state laws which by the act itself were made void" (Fed. Cas. No. 15,459). Even "an alien, as well as a citizen, is protected by the prohibition of deprivation of life, liberty or property without due process and the equal protection of the law." Whitfield v. Hanges 222 Fed. 745; San Mateo County v. So. P. R. Co. 13 F 145.

This being a remedial and not a penal statute, it is to be liberally construed in order that the purpose of the Constitution might not be defeated in any way. U. S. v. Rhodes 1 Abb. 28.

The presentation of the legal issue involved, we think, is complete and covers all the possible issues raised by the appellee under a statute alleged

to be unconstitutional, and the court has jurisdiction over the appellee herein; the plaintiff has legal capacity to sue because he will be injured by the unlawful dissipation of money taken from him under the guise of taxation and paid to a special class to the exclusion of another class otherwise qualified, that there is nobody else upon whom the duty of preventing this waste rests and there is manifestly a wrong being perpetrated.

The complaint is sufficient and entitled the appellant to the relief demanded because he is a proper party beneficially involved, that the appellee has made and will continue to make expenditures under a statute that is unlawful, and that this wrong will continue unless this court enjoins the appellee from continuing these unlawful expenditures.

Respectfully submitted

WILLIAM L. PAUL

Attorney for Appellant.

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NO. 7781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES DEMMERT, for himself and all other Tax Payers similarly situated,

Appellant,

vs.

WALSTEIN G. SMITH, as Territorial Treasurer of the Territory of Alaska,

Appellee.

Upon Appeal from the District Court of Alaska, Division Number One, at Juneau. Hon. George F. Alexander, Judge

Brief of Appellee in Support of Judgment

JAS. S. TRUITT,
Attorney General for Alaska,
and Attorney for the Appellee

Juneau, Alaska

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In the United States Circuit Court of Appeals for the Ninth Circuit

CHARLES DEMMERT, for himself and all other Tax Payers similarly situated,
Appellant,
vs.
WALSTEIN G. SMITH, as Territorial Treasurer of the Territory of Alaska,
Appellee.

NO. 7781

Upon Appeal from the District Court of Alaska, Division Number One, at Juneau. Hon. George F. Alexander, Judge

Brief of Appellee

BRIEF STATEMENT:

The above named plaintiff filed his bill of complaint in equity in the United States Court, above designated, praying for an Injunction to restrain the Defendant, Walstein G. Smith, as Territorial Treasurer of the Territory of Alaska, from paying out of the Territorial Treasury various sums of money appropriated by the Territorial Legislature, (Chap. 119, Session Laws of Alaska, 1933) on the ground and for the reasons stated in his said bill of complaint (Tr. pp. 2-9, incl.), to which bill of complaint, and the whole thereof, the Defendant demurred (Tr. pp. 10-11).

Without other or further reference to the fact that the present incumbent in office as Territorial Trea-

surer of the Territory of Alaska is not liable for the acts of his predecessor, Appellee above named (46 C.J. p. 1046, Sec. 331), we herewith submit our argument in support of the Judgment rendered by the District Court, above entitled.

ARGUMENT ON DEMURRER
Paragraphs One And Two

In the case at bar the defendant contends that the Territory of Alaska, though not named as such, is the real and necessary party defendant. No personal relief is sought against the Territorial Treasurer, no act of his is brought in question, and no official misconduct is charged against him. So far as he is concerned, the action is purely impersonal. It is the aim of the action to enjoin the Territorial Treasurer, in his official capacity, from paying out of the Treasury certain sums of money appropriated by the Territorial Legislature for the purposes stated in the Acts of the Legislature referred to in the plaintiff's bill of complaint (Tr. pp. 3, 4, 5). The opinion of Judge Gilbert in the case of Smith vs. Rackliffe, 87 Federal, Page 966, fairly presents our views with reference to the real party defendant in the case at bar.

TERRITORIES OF THE UNITED STATES:

Alaska is one of the Territories of the United States, assigned to the Ninth Judicial Circuit;

The Steamer Coquitlam, et al vs. United States, 163 U. S. 352, 41 L. Ed. 186.

LEGISLATIVE POWERS:

Congress may transfer the power of legislation in respect to local affairs to a legislature elected by the citizens of a Territory;

> Binns vs. United States, 194 U. S. 491, 48 L. Ed. 1089; Sere vs. Pitot, 6 Cranch, 336; Murphy vs. Ramsey, 114 U. S. 45, 29 L. Ed. 47-58.

Duly organized Territories of the United States are invested with legislative power, which extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States;

> R. S. Section 1851, Wilkerson Plff. in Err. vs. People of the United States in the Territory of Utah, 99 U. S. 130, 25 L. Ed. 346.

ALASKA IS AN ORGANIZED TERRITORY:

By an Act of Congress entitled, "An Act creating a legislative Assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," approved August 24, 1912, Chapter 387, Sec. 1, 37 Stat. 512, (Sec. 21, Tit. 48, USCA) Alaska became an organized and an incorporated Territory of the United States.

The action being one to enjoin and restrain the defendant, in his official capacity, from paying out of the Treasury the various sums of money referred to in the complaint, and not an action attacking the Constitutionality of the taxing Statute under which the various sums of money were collected and paid into the Territorial Treasury, we can arrive at but

one conclusion, to wit, the real and indispensable party defendant, though not named as such, is the Territory of Alaska. It is now well established that, if an indispensable party is not joined, the suit must be dismissed;

> Transcontinental & Western Air vs. Farley, 71 Fed. (2d) 292; Gnerich vs. Rutter, 265 U. S. 393; Webster vs. Fall, 266 U. S. 510.

INCORPORATED TERRITORIES:

Duly incorporated Territories of the United States have always been held to possess an immunity from suit without their consent;

> Porto Rico vs. Rosaly Y. Castillo 227 U. S. 274, 57 L. Ed. 508.

It has been decided that the Government created for Alaska is of such a character as to give it immunity from suit without its consent;

> Pacific American Fisheries vs. Territory of Alaska, 7 Alaska, 147-150.

ACTIONS AGAINST TERRITORIES:

The incorporated Territories of the United States have always been held to possess an immunity from suit without their consent, and though a Territory is not an integral part of the United States the same rule should apply;

> 26 R.C.L. 688, Sec. 30, Citing Porto Rico vs. Rosaly Y. Castillo, 227 U. S. 270, 273, 274, 57 L. Ed. 508, 509, (Stating the rule) To same point, 62 C.J. 819, 820, Sec. 37.

The defendant's demurrer is based on the fact that the complaint shows on its face that the action is, in fact, against the Territory of Alaska, and the Territory has not consented to be sued in respect to the subject matter;

> Pacific American Fisheries vs. Territory of Alaska, 7 Alaska 148; Citing Kawananakoa vs. Polyblank, 205 U. S. 349, 51 L. Ed. 834.

As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record (Osborn vs. Bank of United States, 9 Wheat. 738, 846, 850, 857, 6 L. Ed. 204, 229, 231, 232) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceedings, as appears from the record;

> In re the State of N.Y. Edward S. Walsh, Supt., etc., et al, 256 U. S. 500, 65 L. Ed. 1062; Smith vs. Reeves, 178 U. S. 436, Syl. 1, 440, 44 L. Ed. 1143; Ex Parte Ayers, 123 U. S. 443, 31 L. Ed. 216; Cunningham vs. Macon, 109 U. S. 446, 27 L. Ed. 992; Automobile Abstract and Title Co. vs. Haggerty, 46 Fed. (2d) 86; Lowenstein vs. Evans, 69 Fed. 908; Brown University vs. Rhode Island Agr. College, 56 Fed. 55; McClellan vs. State, 170 Pac. 662; Garden City Ginn Co. vs. Nation, 109 Pac. 772; State vs. Toole, 66 Pac. 496; Love vs. Filtsche, 124 Pac. 30.

It is elementary that the state or sovereign cannot be sued in its own courts without its consent;

Beers vs. Arkansas, 20 How. 527-530, Syl. 1, 15 L. Ed. 991-992; Memphis N.C.R. Co. vs. Tenn. 101 U. S. 333-339; Biscoe vs. Bank of Commonwealth, 11 Pet. 257, 9 L. Ed. 709; Lowenstein vs. Evans, 69 Fed. 908.

Government, state or National, cannot be sued in its own courts or in any other without its consent and permission by law;

Cohens vs. Virginia, 6 Wheat. 264, 380, 392; U. S. vs. Clark, 8 Pet. 436, 444; Carry vs. Curtis, 3 How. 236; Hill vs. United States, 9 How. 386, 389; Reeside vs. Walker, 11 How. 272, 290.

This rule is equally applicable to the organized Territories of the United States;

Territory vs. Doty, 1 Pinney (Wis.) 405; Langford vs. King, 1 Mont. 38; Fisk vs. Cuthbert, 2 Mont. 598.

The court will look behind and through nominal parties to the record to ascertain the real party and will deny relief if it appears that the state is an indispensable party, unless it submits to jurisdiction;

Mohler Et Ux vs. Fish Commission of State of Oregon, 276 Pac. 691, Syl. 3, 692.

ALASKA IMMUNE FROM SUIT WITHOUT ITS PERMISSION:

"A Sovereign is exempt from suit not because of any formal conception or obsolete theory but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. The Territory itself is the fountain from which rights ordinarily flow. It

is true that Congress might intervene just as in the case of a state the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by a Congress or the Constitution, except to the extent of certain limitations of powers;"

Kawananakoa vs. Polyblank, 205 U. S. 349, 355, 354, 51 L. Ed. 834.

The construction of a Territorial statute by the local courts is of great if not controlling weight;

Lewis vs. Herrera, 208 U. S. 309, 314.

The Federal Supreme Court accepts the construction which a Territorial Court has placed upon a local statute; that is, it will not disregard or reverse the same unless constrained to do so by the clearest conviction of serious error;

Work vs. The United Globe Mines, 231 U. S. 595, 599.

Courts generally view the statutes of a Territorial legislature as they do state laws—they are limited only by the Federal Constitution and applicable Federal laws:

"As a general thing subject to the general scheme of local government chalked out by the Organic Act, and such special provisions as are contained therein, the local legislature has been entrusted with the enactment of the entire system of municipal law, subject also, to the right of Congress, to revise, alter and revoke at its discretion. The powers thus exercised by the Territorial Legislature are nearly as extensive

as those exercised by any state legislature;"

Hornbuckle vs. Toombs, 18 Wall. 657, 21 L. Ed. 968; 26 R.C.L. Sec. 25, 683.

The general rule that a state cannot be sued without its consent cannot be evaded by making an act nominally one against the servants or agents of the state when the real claim is against the state itself and it is the party vitally interested;

Wilson vs. La. Purchase Exposition Commission, 110 N.W. 1045, 1046; Edward S. Walsh, Supt. 256, U. S. 500.

It is now settled that the jurdisdiction in such cases is dependent upon the real and not upon the nominal parties to the suit, and it is now claimed, both upon principles and authority, that a suit against the officers of a state is in fact and legal effect against the state, though the state itself is not named a party on the record;

Hagwood vs. Southern, 117 U. S. 52, 67.

Equity will not interfere to enjoin a public officer from doing an act which the law requires him to perform merely because it may result in a peculiar hardship in a particlar instance;

Southern Ore. Co. vs. Gage, 149 Pac. 272.

The treasurer of a state is not a trustee of monies in the state treasury. He holds them only as the agent of the state. If there is any trust the state is the trustee and unless it can be sued the trustee can not be enjoined;

La. on the relation of John Elliott, et al, vs. Allen Jumel, Auditor of State, et al, 107 U. S. 711, 713 (27 L. Ed. 448, Esp. 452).

Duly organized and incorporated territories of the United States are not municipal corporations;

Dillon on Municipal Corporations, 4 Ed. Vol. 1, Secs. 38, 56; Coffiele vs. Terr. 13 Haw. 479.

The grant of legislative power in all acts organizing territories extends to all rightful subjects of legislation;

Maynard vs. Hill, 125 U. S. 190, 204, 31 L. Ed. 657.

As a general rule the legislature of a territory has been entrusted with power, co-extensive with that of the states, to enact a system of municipal law, subject to its Organic Act and the right of Congress to revise, alter, or repeal;

Hornbuckle vs. Toombs, 18 Wall. 659, 21 L. Ed. 968.

A suit to restrain officers of a state from taking any steps, by means of judicial procedure, in execution of a state's statute to which they do not hold any special relation, is really a suit against the state within the prohibition of the Eleventh Amendment of the Federal Constitution;

Fitts vs. McGhee, 172 U. S. 516, 525, 526.

In making an officer of the suit a party defendent in the suit to enjoin the enforcement of an act alleged to be unconstitutional, such officer must have some connection with the enforcement of the act arising

out of the general law or specially created by the Act itself, or else it is merely making him a party as the representative of the state, and thereby attempting to make the state a party;

Ex Parte Young, 209 U. S. 123, 157, 52 L. Ed. 728.

Where a state is not only the real party to the controversy, but the real party against which relief is sought, the nominal defendants being its officers and agents, without any personal interest in the subject matter, the suit is substantially within the prohibition of the Eleventh Amendment;

Hagwood vs. Southern, 117 U. S. 52, Syl. 3, 67-71, 29 L. Ed. 810, 811.

Money in the treasury of a state raised by taxation is the legal property of the state, and if there is any trust attaching to it, arising from the purposes for which it was raised, the state, and not the treasurer, is the trustee; and no mandamus or other remedy can reach the state except against the state as a party;

Louisiana ex rel. Elliott vs. Jumel, 107 U. S. 711, Syl. 1, 3, 4, 27 L. Ed. 448.

Courts have no authority when a state cannot be sued to set up jurisdiction of officers in charge of public monies, so as to control them, as against the political power, in the administration of the finances of the state;

Elliott vs. Jumel, 107 U. S. 711, Supra.

When it appears that a state is an indispensable party to enable a Federal court to grant relief sought

by private parties, and the state has not consented to be sued, the court will refuse to take jurisdiction;

> Missouri vs. Fiske, 290 U. S. 18, 28; Cunningham vs. Macon & Brunswick R. Co. 109 U. S. 446, 451, 457; In re Ayers, 123 U. S. 443, Syl. 4, 5, 6 and p. 489; Christian vs. Atlantic & N.C.R. Co. 133 U. S. 223, 224; Stanley vs. Schwalby, 147 U. S. 508, 518; So. Carolina vs. Wesley, 155 U. S. 542, 545; Belknap vs. Schild, 161 U. S. 10, 20.

Whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, but by a consideration of the nature of the case;

> Syl. 4, Ex Parte Ayers, 123 U. S. 443, 31 L. Ed. 216.

In such a case, though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still in substance, though not in form, a suit against the state;

> Syl. 6, Ex Parte Ayers, Supra.

The legal title to public monies in the hands of the state treasurer or other officer entitled to the custody thereof is in the state and not in such officer;

> State vs. McFetridge, 54 N.W. 14, 15. Motion for rehearing denied, 54 N.W. 998.

PARTICULAR STATUTES ATTACKED:

Plaintiff alleges in his complaint that Sections 26, Chapter 65, S.L.A. 1929, as amended by Chapter 89,

S.L.A. 1933, same being Sec. 1821, C.L.A. 1933, and Sec. 28, Chap. 65, S.L.A. 1929, same being Sec. 1823, C.L.A. 1933 (Tr. 5, 6, 7) to be unconstitutional on the ground that such statutes discriminate against the native Indians, residents of Alaska, from which we conclude his action not that of a tax payer, but as a champion of the native Indians, Eskimos and Aleuts, residents of Alaska.

In order to subject a territorial statute to the annulling clause of an Act of Congress, the conflict should be direct and unmistakable. No law will be declared void because it may indirectly, or by a possible and not a necessary construction, be repugnant to annulling act;

Cope vs. Cope, 137 U. S. 686.

A statute will not be declared void unless its invalidity is distinctly pointed out and clearly shown, and therefore one who alleges that a statute is unconstitutional must point out the specific constitutional provision that is violated by it;

12 C.J. 785, Sec. 216; Talcott vs. Pinegrove, 23 Fed. Case No. 13, 735, 22 L. Ed. 277, 232, Ex Parte Anderson, 123 Pacific, 972; Crowley vs. State, 6 Pacific, 70.

An allegation that one section of a statute is unconstitutional on specific ground does not raise the question of the invalidity of another section on such ground;

Roberts vs. Evanston, 75 Northeastern, 923.

The constitutionality of a statute on the ground

that it denies equal rights and privileges by discriminating between persons or classes of persons may not be raised by one not belonging to the class alleged to be discriminated against. This has been held in numerous cases and the rule applies to all cases affecting civil rights of every kind, and also to cases where property rights only are effected;

12 C. J. Sec. 189, p. 768.

In taxpayer's actions to test the constitutionality of a statute, only such questions will be considered as bear on its validity as a whole;

State vs. Eberhardt, 147 Northwestern, 1016.

The constitutionality of a statute cannot be assailed without showing that the party questioning it has been or is likely to be deprived of his property without due process of law; a court cannot assume to decide the general question whether the statute as to some other person amounts to a deprivation of property;

Tyler vs. Judges, 179 U. S. 410.

"One who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates to deprive him of rights protected by the Federal Constitution;"

Standard Stock Food Co. vs. Wright, as State and Dairy Commissioner, 225 U. S. 540, Syl. 4, 56 L. Ed. 1197, Syl. 4, p. 1201.

DEMURRER—PARAGRAPH THREE

Plaintiff has no capacity to sue; he fails to bring himself within the class alleged to be discriminated against, therefore, the averments in plaintiff's complaint are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional;

> Southern R. Co. vs. King, 217 U. S. 524, 534, 54 L. Ed. 868, 873; Chitty Pl. 1, Cited in Tyler vs. Judges Court of Registration, 179 U. S. 405, 407, 45 L. Ed.

The word Capacity has a definite meaning: "Ability, power, qualification, or competency of persons, natural or artificial, for the performance of civil acts depending on their state or condition as defined or fixed by law;"

> Bouvier's Law Dictionary, 1934 Ed.

The unconstitutionality of a statute on the ground that it denies equal rights and privileges by discriminating between persons or classes of persons may not be raised by one not belonging to the class alleged to be discriminated against;

> Hendrick vs. Maryland, 235 U. S. 610, 621; New York ex rel Hatch vs. Reardon, 204 U. S. 152, 161, 160; Williams vs. Walsh, 222 U. S. 415, 423; Collins vs. Texas, 223 U. S. 288, 295, 296; M.K.&T.R. Co. vs. Cade, 233 U. S. 642, 648, 650; Murphy vs. California, 225 U. S. 630, 631.

The objection that a statute regulating the distribution of money for school purposes discriminates

against Negroes cannot be raised by a white person;

Reid vs. Eatonton, 6 S.E. 602;
Norman vs. Boaz, 4 S. W. 316;
Eakins vs. Eakins, 20 S.W. 285.

The objection that a statute is unconstitutional because discriminatory can only be taken by the person discriminated against, or adversely affected;

Albany County vs. Stanley, 105 U. S. 305, 26 L. Ed. 1044; Clark vs. Kansas City, 176 U. S. 114, 44 L. Ed. 392; Chadwick vs. Kelley, 187 U. S. 540, 47 L. Ed. 293; Cronin vs. Admas, 192 U. S. 108, 28 L. Ed. 365; Brown vs. Ohio Valley R. Co. 79 Fed. 176.

A person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute;

6 R.C.L. Par. 89, p. 91—Citing Iroquois Transp. Co. vs. DeLaney, Forge & Iron Co. 205 U. S. 354, 51 L. Ed. 836; Fidelity & Casualty Co. of New York vs. Freeman, 109 Fed. 847; Lee vs. State of New Jersey, 207 U. S. 67, 52 L. Ed. 106.

"A member of a particular class which may be discriminated against does not necessarily have the right to champion any grievance of that entire class in the absence of any actual interest which is prejudiced or impaired by the statute in question. * * * On the same principle a white person cannot raise the question whether the exclusion of Negroes from participating in the benefits of the common school system of the state is or is not in violation of the state

constitution;"

6 R.C.L. Sec. 90, p. 91-Citing Commonwealth vs. Wright, 42 Amer. Rept. 203.

The provisions of Sec. 26, Chap. 65, S.L.A. 1929, as amended by Chap. 89, S.L.A. 1933 (Sec. 1821, C.L.-A. 1933) are directory, and qualifies, to some extent, the provisions of Sec. 28, Chap. 65, S.L.A. 1929 (Sec. 1823, C.L.A. 1933) by authorizing the Governor of Alaska to hear and pass upon the eligibility of all applications of dependents for relief under the laws of Alaska. Section 8, Chap. 46, S.L.A. 1923 referred to in Paragraph 4 of the plaintiff's complaint has no application to the case at bar, and furthermore was repealed by said Chapter 65, S.L.A. 1929.

The court has the right to assume that the Territorial Legislature in the enactment of the statutes above referred to duly considered the relationship of guardian and ward now existing, and has existed since March 30, 1867 between the Federal Government and the native Indian and Eskimo peoples of the Territory of Alaska. The fact that the Territory of Alaska has permitted certain natives the right of suffrage under the provisions of Sec. 57, Title 48, USCA, Sec. 1451, CLA 1933, does not alter their relations to the United States;

U. S. vs. Rickert, 188 U. S. 432, 445, 47 L. Ed. 539.

Citizenship is not in itself an obstacle to the exercise by Congress of its powers to enact laws for the benefit and protection of the Indians as a dependent

people;

U. S. vs. Celestine, 215 U. S. 278, 289, 54 L. Ed. 195; Tiger vs. Western Inv. Co. 221 U. S. 286 Syl. 55 L. Ed. 738; Hallowell vs. U. S. 221 U. S. 317, 323, 55 L. Ed. 750; U. S. vs. Sandoval, 231 U. S. 28 Syl. 58 L. Ed. 107; Bowling vs. U. S. 233 U. S. 528 Syl. 58 L. Ed. 1080.

WARDS OF FEDERAL GOVERNMENT

In the case of Winton V. Amos, 255 U. S. 373, 391, 392, 65 L. Ed. 684, Mr. Justice Pitney delivered the opinion of the Court and holds: "It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency, and it rests with Congress to determine when the relationship shall cease; the mere grant of citizenship not being sufficient to terminate it."

Indian Tribes are the wards of the Nation, Lone Wolf vs. Hitchcock, 187 U. S. 567.

The Indians, Eskimos, Aleuts, and other natives of Alaska are the wards of the United States and as such are by Federal appropriations annually provided for.

OFFICIAL STATEMENT AS TO LEGAL STATUS OF ALASKA NATIVES, Approved by the Secretary of the Interior, February 24, 1932, hereto attached as an Appendix to this brief.

BURDEN
ESTABLISHING UNCONSTITUTIONALITY

In the case of the Metropolitan Casualty Insurance Company vs. Brownell, 294 U. S. 584, 79 L. Ed. 566, Mr. Justice Stone delivered the opinion of the Court and stated: "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators." Citing cases.

A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it;

> Rast vs. Van Deman and L. Co. 240 U. S. 342; State Tax Com'rs. vs. Jackson, 283 U. S. 527, 537.

"There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of

employment, this would not amount to a constitutional objection;"

> Middleton vs. Texas Power & L. Co. 249 U. S. 152, 157, 158, 63 L. Ed. 527, 531—Cases cited.

The clause in the 14th Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws does not prevent a state from adjusting its legislation to differences in situation, or forbid classification in that connection; but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation;

> Power Mfg. Co. vs. Harvey Saunders 274 U. S. 493, 71 L. Ed. 1168 to same point Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 400, 72 L. Ed. 929.

Above quoted with approval in the case of Joseph Triner Corp. vs. Arundel, 11 Fed. Supp. 147.

The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism;

> Middleton vs. Texas Power & L. Co. 249 U. S. 152, 158, 63 L. Ed. 531.

RE: DISCRIMINATION

There are no averments of any facts in the plaintiff's complaint which warrant a conclusion that the plaintiff individually is being discriminated against

at all;

Lipson vs. Scony-Vacuum Corp. 76 Fed. (2d) 217.

TERRITORIAL TREASURER:

Section 3188, Compiled Laws of Alaska 1933, designates the duties and responsibilities of the Territorial Treasurer with reference to Territorial funds collected by him, and specifically provides all such funds to be the property of the Territory of Alaska.

INJUNCTION

The function of an injunction is to afford preventive relief, and not to redress wrongs already committed;

Lacassagne vs. Chapuis, 144 U. S. 119, 36 L. Ed. 368; Industrial Ass'n. vs. U. S. 268 U. S. 64, 69 L. Ed. 849; Boggus Motor Co. vs. Onderdonk, 9 Fed. Supp. 959.

Control of Executive Officers by Mandamus or Injunction

The Territorial Treasurer is an Executive Officer. Sec. 4879, C.L.A. 1933.

The judiciary cannot properly interfere with executive action when the executive officer is authorized to exercise his judgment or discretion;

Dudley vs. James, 83 Fed. 345; Gaines vs. Thompson, 7 Wall. 347.

"But no injunction can be issued against officers of a state, to restrain or control the use of property

already in the possession of the state, or money in its treasury when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party. Similarly where injunction proceedings although nominally against public officers are in reality against the United States, the Court will not grant the relief requested;"

22 R.C.L. Sec. 173, p. 494; McGahey vs. Virginia, 132 U. S. 662, 34 L. Ed. 304; Pennoyer vs. McConnaughy, 140 U. S. 1, 35 L. Ed. 363; Belknap vs. Schild, 161 U. S. 10, 40 L. Ed. 599.

STATUTORY CONSTRUCTION

The Right to Incorporate in General

Except where there is some constitutional inhibition against it, the provisions of one act may be made applicable to another by a reference to the former in the latter, which may be effected by reference to particular sections of the former act that are to be incorporated, or by a general reference to the whole act or body of statutes or laws concerning a particular subject, in so far as the provisions are applicable, or not conflicting;

59 C.J. Secs. 167, 168, p. 610, 611.

The adoption of an earlier statute by reference makes it as much a part of the latter as though it had been incorporated in full length;

Engel vs. Davenport, 271 U. S. 38, 70 L. Ed. 1181, 1221; Re Heath, 144 U. S. 92, 94, 36 L. Ed. 358, 359.

"The adoption of the earlier act brings into the latter act all that is fairly covered by the reference;"

Panama R.R. Co. Case 264 U. S. 392, 68 L. Ed. 755;

holding all the provisions of the former act which from the nature of the subject matter are applicable to the latter act.

An adoption of an existing statute by an act of the legislature, which refers generally to the law relating to the subject, will include not only the law in force at the date of the adopting act, but also such amendments of the law as are in force when action is taken or a proceeding is resorted to under such law;

People vs. Kramer, 160 N.E. 60.

Burden of proof, where constitutionality of a statute is in question, is always upon the party asserting unconstitutionality since presumption obtains that legislature knows its constitutional limitations of power and has not exceeded them;

City of Louisville vs. Babb, 75 Fed. (2d) 162, Syl. 4. Cert. den. 55 S. CT. 650.

In case of doubt statute should be so construed so as to uphold its validity;

Louisville Joint Stock Land Bank vs. Radford, 74 Fed. (2d) 576.

A discriminatory statute will not be overthrown by courts unless palpably arbitrary;

Bayside Fish Flour Co. vs. Gentry, 8 Fed. Supp. 67.

Acts should be declared void only when incompatability between it and Constitution is clearly apparent;

In re Oetman, 9 Fed. Supp. 575.

Courts may not ignore executive interpretation of statute;

American Exchange Sec. Corp. vs. Helvering, 74 Fed. (2d) 213.

Construction of statute by governmental department charged with its execution should not be overruled without cogent reasons;

City of Tulsa vs. Southwestern Bell Telephone Co. 75 Fed. (2d) 343.

Interpretations of law by those charged with its enforcement are generally of great weight;

Brebham vs. Cooper, 9 Fed. Supp. 904.

Injunction does not lie merely because an act is unconstitutional, but one must further show some clear ground of equity jurisdiction;

Richmond Hosiery Mills vs. Camp 74 Fed. (2d) 200.

DEMURRER—PARAGRAPH FOUR

Plaintiff's failure to allege facts sufficient to give the Court jurisdiction over the person of the defendant or the subject of the action, and failure to allege facts showing plaintiff's legal capacity to sue, leads us to the conclusion that the complaint does not state facts sufficient to constitute a cause of action or to entitle plaintiff to any relief in his complaint de-

manded—An objection never waived under Alaska practice (Kohn vs. McKinnon, 90 Fed. 624).

Respectfully submitted,

JAS. S. TRUITT
Attorney General for Alaska,
Juneau, Alaska

APPENDIX

Opinion approved February 24, 1932, by Ray Lyman Wilbur, Secretary of the Interior:

"The Honorable
The Secretary of the Interior
Dear Mr. Secretary:

You have requested my opinion on the legal status of the natives of Alaska—Eskimos, Aleuts, Indians, et al.

Alaska was ceded to the United States by Russia under the treaty of March 30, 1867 (15 Stat. 539). Article III of the treaty provides:

> 'The inhabitants of the ceded territory, ... if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.'

An opinion by the Solicitor of this Department

under date of May 18, 1925 (49 L.D. 592), sets forth the following:

> 'In the beginning, and for a long time after the cession of this Territory Congress took no particular notice of these natives; has never undertaken to hamper their individual movements; confine them to a locality or reservation, or to place them under the immediate control of its officers, as has been the case with the American Indians; and no special provision was made for their support and education until comparatively recently. And in the earlier days it was repeatedly held by the courts and the Attorney General that these natives did not bear the same relation to our government, in many respects, that was borne by the American Indians.' (16 Ops. Atty. Gen. 141; 18 id., 139); United States v. Ferueta Seveloff (2 Sawyer U. S. 311); Hugh Waters v. James B. Campbell (4 Sawyer U. S. 121); John Brady et al. (19 L.D. 323).

With the exception of the act of March 3, 1891 (26 Stat. 1095, 1101), which set apart the Annette Islands as a reservation for the use of the Metlakahtlans, a band of British Columbian natives who immigrated into Alaska in a body, and also except the authorization given to the Secretary of the Interior to make reservations for landing places for the canoes and boats of the natives, Congress has not created or directly authorized the creation of reservations of any other character for them.

Later, however, Congress began to directly recognize these natives, as being, to a very considerable extent at least, under our Government's guardianship and enacted laws which protected them in the pos-

session of the lands they occupied; made provision for the allotment of lands to them in severalty, similar to those made to the American Indians; gave them special hunting, fishing and other particular privileges to enable them to support themselves, and supplied them with reindeer and instructions as to their propagation. Congress has also supplied funds to give these natives medical and hospital treatment and finally made and is still making extensive appropriations to defray the expenses of both their education and their support.

Not only has Congress in this manner treated these natives as being wards of the Government but they have been repeatedly so recognized by the courts. See Alaska Pacific Fisheries v. United States (248 U. S. 78); United States v. Berrigan et al. (2 Alaska Reports, 442); United States v. Cadzow et al. (5 id. 125), and the unpublished decision of the District Court of Alaska, Division No. 1, in the case of Territory of Alaska v. Annette Islands Packing Company et al., rendered June 15, 1922.

From this it will be seen that these natives are now unquestionably considered and treated as being under the guardianship and protection of the Federal Government, at least to such an extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians; and this conclusion is supported by the fact that in creating the territorial government of Alaska and vesting that territory with the powers of legislation and control

over its internal affairs, including public schools, Congress expressly excluded from that legislation and control the schools maintained for the natives and declared that such schools should continue to remain under the control of the Secretary of the Interior.

Any change that may have occurred in the original attitude of the United States towards the natives of Alaska is reflected in subsequent acts of Congress which were invariably intended to be in their interest and for their benefit, no distinction being made as to any particular natives.

Some disposition has been shown to make a distinction between the Indians of Alaska and other natives, particularly the Eskimos. It has been asserted by ethnologists that the Eskimos are not of Indian but more likely are of Manchurian and Chinese origin. After the Indians, the Eskimos of Alaska are probably the most advanced of the natives and for this reason these two races are best known and are more frequently referred to than the other natives such as the Aleuts, Athapascans, Tlinkets, Hydahs and other natives of indigenous race inhabiting the Territory of Alaska. The Eskimos are said to know nothing of their early predecessors. The origin of the natives of Alaska will possibly some day become known, but whether that comes to pass or not the fact is that they are all wards of the Nation and are treated in material respects the same as are the aboriginal tribes of the United States.

The act of March 3, 1899 (30 Stat. 1253), defining the penal and criminal laws of the United States relating to the District of Alaska provides in section 142 of Chap. 8 thereof, in the matter of selling liquor or firearms to Indians, as follows:

> 'The term 'Indian' in this Act shall be so construed as to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood.'

The above provision was amended by the act of February 6, 1909 (600, 603), by adding after the words "half blood"—'who have not become citizens of the United States.' This provision loses whatever significance it may have had if the act of June 2, 1924 (43 Stat. 253), declaring 'all non-citizen Indians born within the territorial limits of the United States' to be citizens of the United States, is applicable to the natives of Alaska.

In the case of United States v. Lynch (7 Alaska Reports 468, 572), referring to article III of the treaty of cession between Russia and the United States, the court held:

> 'Under this treaty the Tlinket tribe became subject to such rules and regulations as the United States may thereafter adopt as to the native Indians of the United States. Therefore, by the provisions of the treaty, the Indians of the Tlinket tribe became citizens of the United States, in common with the native Indian tribes of the United States, under the Act of June 2, 1924 (8 USCA Sec. 3), which provided that all non-citizen Indians, born within the territorial limits of the United States, shall be citizens, and that

> the granting of citizenship shall not, in any manner, impair or otherwise affect the right of any Indian to tribal or other property.'

Demurrer in the Lynch case was overruled. (7 Alaska Reports 643); see also case of Rasmussen v. United States (197 U. S. 516).

As Indians of Alaska are within the category of natives of Alaska and as the term 'Indian' is to be so construed as to include the aboriginal races inhabiting Alaska, the ruling of the court in the Lynch case would seem to be equally applicable to all other natives of that Territory.

Reference to the provisions of certain acts will give a definite idea of the extent to which the natives of Alaska have been recognized by the Congress as well as show the similarity of their treatment to that accorded the Indians of the United States. In the first place, the treaty between Russia and the United States after providing that the civilized native tribes 'shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States and shall be maintained and protected in the free enjoyment of their liberty, property and religion,' further provides:

> 'The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.'

The Indians, Eskimos, Aleuts and other natives of Alaska are therefore the wards of the Nation the same as are the Indians inhabiting the States. In re

Sah Quah (31 Fed. 327), wherein it was held:

> 'The United States has at no time recognized any tribal independence or relations among these Indians, has never treated with them in any capacity, but from every act of Congress in relation to the people of this territory it is clearly inferable that they have been and now are regarded as dependent subjects, amenable to the penal laws of the United States, and subject to the jurisdiction of its courts . . . . They are practically in a state of pupilage, and sustain a relation to the United States similar to that of a ward to a guardian, . . . '

In section 13 of the act of May 17, 1884 (23 Stat. 24, 27), entitled 'An Act providing a civil Government for Alaska' the Secretary of the Interior is authorized to make needful and proper provision for the education of the children of school age in the Territory of Alaska 'without reference to race, until such time as permanent provisions shall be made for the same.'

A similar provision is contained in the act of June 6, 1900 (31 Stat. 321, 330). This act was amended by the act of March 3, 1901 (31 Stat. 1438), by providing that 50 per cent of all license money collected on business carried on outside incorporated towns in the District of Alaska should be used by the Secretary of the Interior in his discretion and under his direction for the support of schools outside incorporated towns. All schools were supported by annual appropriations made by Congress up to June 30, 1901. Thereafter, all schools outside incorporated towns remained under the supervision of the Secretary of the

Interior and were supported by the license money referred to, until January 27, 1905.

The act of January 27, 1905 (33 Stat. 616), entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska and for other purposes' provided in section 7 thereof as follows:

> 'That the schools specified and provided for in this Act shall be devoted to the education of white children and children of mixed blood who lead a civilized life. The education of the Eskimos and Indians in the district of Alaska shall remain under the direction and control of the Secretary of the Interior and schools for and among the Eskimos and Indians of Alaska shall be provided for by an annual appropriation, and the Eskimo and Indian children of Alaska shall have the same right to be admitted to any Indian boarding school as the Indian children in the States or Territories of the United States.'

The act of March 30, 1905 (33 Stat. 1156, 1188), made an appropriation:

> 'To enable the Secretary of the Interior, in his discretion and under his direction, to provide for the education and support of the Eskimos, Indians, and other natives of Alaska; for erection, repair, and rental of school buildings; for text-books and industrial apparatus; for pay and necessary traveling expenses of general agent, assistant agent, superintendents, teachers, physicians, and other employees, and all other necessary miscellaneous expenses which are not included under the above special heads, fifty thousand dollars, to be immediately available.'

The appropriation made by act of June 30, 1906 (34 Stat. 697, 729) for $100,000 was 'to enable the Secretary of the Interior in his discretion and under his direction, to provide for the education and support of the Eskimos, Aleuts, Indians and other natives of Alaska.'

Appropriations in increased amounts have since been made by Congress annually for the support of schools among the Eskimos, Aleuts, Indians and other natives of Alaska, the amount appropriated for that purpose for the fiscal year ending June 30, 1920, being $250,000. The act of May 27, 1908 (35 Stat. 317, 351) contains this additional provision:

> 'That all expenditure of money appropriated herein for school purposes in Alaska shall be under the supervision and direction of the Commissioner of Education and in conformity with such conditions, rules and regulations as to conduct and methods of instruction and expenditure of money as may from time to time be recommended by him and approved by the Secretary of the Interior.'

All subsequent acts making appropriations for the support of schools among the natives of Alaska contain a like provision to the above.

The Territory of Alaska was created by the act of August 24, 1912 (37 Stat. 512) and it is provided in section 3 thereof that the authority granted therein to the legislature to alter, amend, modify, and repeal laws in force in Alaska, shall not extend to the act of January 27, 1905, supra, and the several acts

amendatory thereof, which act provides that schools for and among the Eskimos and Indians of Alaska shall be provided for by an annual appropriation.

Section 416 of the Compiled Laws of Alaska provides: 'The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.'

The act of March 3, 1917 (39 Stat. 1131), reads as follows:

> 'That the Legislature of Alaska is hereby empowered to establish and maintain schools for white and colored children and children of mixed blood who lead a civilized life in said territory and to make appropriations of Territorial funds for that purpose; and all laws or parts of laws in conflict with this Act are to that extent repealed.'

Until that act was passed, as hereinbefore shown, the matter of schools for the children named therein was controlled by congressional legislation.

In later acts, notably that of May 24, 1922 (42 Stat. 552, 583), Congress went further and made and is still making appropriations 'To enable the Secretary of the Interior, in his discretion and under his direction, to provide for the education and support of the Eskimos, Aleuts, Indians and other natives of Alaska.'

Two things are apparent from the foregoing, namely that the Indians and other natives of Alaska are as truly the wards of the Nation as are the abor-

igines and their descendants inhabiting the States with whom the Government has had to deal since its organization; and that Congress has assumed full cost for all educational facilities among the Alaskan natives. Under the act of March 3, 1917, supra, separate schools are in existence in Alaska, that is those for the education of white and colored children and 'children of mixed blood who lead a civilized life,' established and maintained by appropriations from territorial funds; and those for the education of Eskimos, Aleuts, Indians, and other natives provided for by the annual appropriations of Congress.

The Solicitor for this Department has held that the Territory of Alaska can not legally collect from Eskimos, Aleuts, and other natives of Alaska of full blood nor of those natives of mixed blood who do not lead a civilized life, the school tax imposed by the territorial act. The case of Davis v. Sitka School Board (3 Alaska Reports 481), involved a construction of the act of January 27, 1905, supra, particularly that provision relating to 'children of mixed blood who lead a civilized life.' The court held that

> 'While the Davis children are of 'mixed blood,' they do not 'lead a civilized life,' within the meaning of section 7 of the act of Congress of January 27, 1905 (33 Stat. 617, c. 277), so as to entitle them to attend the public schools maintained for 'white children and children of mixed blood who lead a civilized life.' Held, that mandamus will not lie to compel the school board of Sitka to admit such children to the public schools therein; it appearing that the Government main-

tained a separate school for Eskimos and Indians 'under the direction and control of the Secretary of the Interior.'

In the case of United States v. Berrigan (2 Alaska Reports 442), referring to the clause of the third article of the treaty of 1867 between Russia and the United States that 'the uncivilized tribes (in Alaska) will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country,' it was held:

> 'That the Athapascan stock, including the native bands of the Tanana, belong to the uncivilized tribes mentioned in this clause. As such they are entitled to the equal protection of the laws which the United States affords to similar aboriginal tribes within its borders.'

Also that—

> 'All the vacant and unappropriated lands in Alaska at the date of the cession of 1867 by Russia became a part of the public domain and public lands of the United States.'

And further that—

> 'The uncivilized native tribes of Alaska are wards of the Government. The United States has the right, and it is its duty to protect the property rights of its Indian wards.'

In the case of Nagle v. United States (191 Fed. 141), after referring to the act of May 17, 1884, supra, providing a civil government for Alaska, and to section 1891 of the United States Revised Statutes which provide that 'The Constitution and all laws of the United States which are not locally inapplicable,

shall have the same force and effect within all the organized territories, and in every territory hereafter organized as elsewhere within the United States,' the court held 'all laws of Congress of general application not locally inapplicable are in effect in Alaska.' The court further held:

> 'The provision of Act Feb. 8, 1887, c. 119, sec. 6, 24 Stat. 390, relating to allotments of lands to Indians in severalty, that 'every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizen,' is in effect in Alaska, and operates to make Indians therein who are descendants of the aboriginal tribes, born since the annexation of Alaska, but who have voluntarily taken up their residence separate and apart from any tribe and adopted the habits of civilization, citizens of the United States, and the sale of liquor to such an Indian does not constitute an offense under Alaska Code Cr. Proc. Sec. 142 as amended by Act Feb. 6, 1909, c. 80, sec. 9, 35 Stat. 605 making it an offense to sell liquor to an 'Indian,' which term is defined to include the aboriginal races, inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood 'who have not become citizens of the United States.'

The court also held, referring to the clause in article III of the Alaska treaty with Russia stipulating that the uncivilized native tribes of Alaska, 'will be subject to such laws and regulations as the United

States may from time to time adopt in regard to aboriginal tribes in that country;' 'there can be no doubt that this stipulation relates to the Indian tribes in Alaska, and manifestly the treaty was designed to insure them like treatment, under the laws and regulations of Congress, as should be accorded Indian tribes in the United States.'

It was argued in the Nagle case, supra, that because the Government has never treated the Indian tribes in Alaska, therefore it was not the intendment that general laws respecting Indians should extend to the Territory of Alaska. But the court said:

> 'It should be borne in mind, however, that it has long since been declared to be the policy of Congress not to treat further with the Indians as tribes. Act March 3, 1871, c. 120, 16 Stat. 544, 566. Ever since the passage of that act, Congress has governed the Indians by law, and not by treaty, and the policy affords cogent reason why general laws should apply to individual Indians in Alaska as well as elsewhere.'

It was held in the case of United States v. Cadzow (5 Alaska Reports 125), that the aboriginal tribes of Alaska have a right to occupy the public lands of the United States therein subject to the control of both the lands and the tribes by the United States; also that the uncivilized native tribes of Alaska are wards of the Government—the United States has the right, and it is its duty to protect the property rights of its Indian wards.

There are provisions in each of the following acts

designed to protect the Indians of Alaska in the use and occupancy of the lands held by them: Acts of May 17, 1884 (23 Stat. 24), and June 6, 1900 (31 Stat. 330), providing a civil government for Alaska; Act of March 3, 1891 (26 Stat. 1095), repealing timber culture laws and for other purposes, and act of May 14, 1898 (30 Stat. 412), extending the homestead laws and providing for right of way for railroads in the District of Alaska.

The act of May 17, 1906 (34 Stat. 197), is entitled 'An Act authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska.' This act authorizes the Secretary of the Interior in his discretion to allot not to exceed 160 acres of non-mineral land 'to any Indian or Eskimo of either full or mixed blood who resides in and is a native of said District.' It was held in the case of Frank St. Clair (52 L.D. 597, 599-600):

> 'This is a special act relating to Alaska natives and is clearly separate and distinct from the act of May 14, 1898 (30 Stat. 409), extending the homestead land laws of the United States to the district of Alaska.'

The vacant and unappropriated lands in Alaska at the date of cession of 1867 by Russia became a part of the public domain of the United States; and the Indians of Alaska are wards of the Government and as such are entitled to the equal protection of the laws applicable to Indians within the limits of the United States. United States v. Berrigan (2 Alaska Reports 442); United States v. Cadzow (5 Alaska Reports

125). The natives of Alaska are wards of the Government and under its guardianship and care at least to such an extent as to bring them within the spirit if not within the exact letter of the laws relative to American Indians; their relations are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the United States (49 L.D. 592). The Indians and other 'natives' of Alaska are in the same category as the Indians of the United States; from an early date, pursuant to the legislative intent indicated by Congress, this department has consistently recognized and respected the rights of the Indians of Alaska in and to the lands occupied by them (50 L.D. 315; 51 L.D. 155); Alaska Pacific Fisheries v. United States (248 U. S. 78); Territory of Alaska v. Annette Island Packing Co. (289 Fed. 671).

The status of an applicant under the act of May 17, 1906, authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska, is analogous to section 4 of the act of February 8, 1887 (24 Stat. 388), which provides that an Indian who has settled upon public lands of the United States shall be entitled to have the same allotted to him in the manner as provided by law for allotments to Indians residing upon reservations. This, of course, involves separation and living apart from the tribe. A reservation allottee is not required to reside upon or improve the land allotted to him. The court took the

position in the case of Nagle v. United States (191 Fed. 141), that said act, especially that section thereof which declares an Indian born within the Territorial limits of the United States who has taken up within said limits his residence separate and apart from the tribe to be a citizen, is in effect in Alaska.

The allotment to an Indian or Eskimo under the act of May 17, 1906, creates a particular reservation of the land for the allottee and his heirs, but the title remains in the United States, Charlie George et al. (44 L.D. 113), Worthen Lumber Mills v. Alaska Juneau Gold Mining Co. (229 Fed. 966).

See also 44 L.D. 113 and 48 L.D. 435.

The natives of Alaska do not for the most part live on reservations and very few have been created. However, the Attorney General and the courts have recognized that power exists to create Indian reservations as well as reservations for other public purposes. Alaska Pacific Fisheries v. United States (248 U. S. 78); United States v. Leathers (26 Fed. Cas. 897); and 17 Ops. Atty. Gen. 258.

The act of March 3, 1891 (26 Stat. 1095, 1101), authorizing the establishment of townsites in Alaska, the acquisition by individuals of limited areas for trade or manufacturing purposes, etc., expressly excepts 'any lands . . . to which the natives of Alaska have prior rights by virtue of actual occupation.' The act also set apart the Annette Islands as a reservation for the use of the Metlakahtla Indians who immi-

grated from British Columbia to Alaska, 'and such other Alaskan natives as may join them.' It has since been held that the reservation so created extends to and includes adjacent 'deep waters.' It was also held in that case—

> 'The reservation was not in the nature of a private grant but simply a setting apart until otherwise provided by law of designated public property for a recognized public purpose—that of safeguarding and advancing a dependent Indian people dwelling within the United States.' See United States v. Kagama (118 U. S. 375, 379, et seq.); United States v. Rickert (188 U. S. 432, 437).

The purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. True, the Metlakahtlans were foreign born, but the action of Congress has made that immaterial here.

And in the case of Territory v. Annette Island Packing Company (6 Alaska Reports 585, 601, 604)—

> 'While it may be true, as urged by counsel for the Territory that the Metlakahtlans residing on the reserve are not a tribe of Indians in the sense used in the Constitution of the United States, yet they are, and always have been, recognized as members of the Indian race, and the dealings of the Government with them have been as if they were a dependent people . . . These people, residing on a reservation established on their behalf by Congress, which they were authorized to use in common, subject to such re-

strictions and regulations as the Secretary of the Interior might make, took, in my view, a status politically analogous to that of native Indians on reservations within the United States, and hence became wards of the government. This view of the status of these people is borne out by the Supreme Court in Alaska-Pacific Fisheries v. United States, reported in 248 U. S. 78, 39 Supp. Ct. 40, 63 L. Ed. 138.'

The court also held in that case:

'The contract of lease between the Secretary of the Interior and the Annette Island Packing Company, together with its cannery, fish traps, and property used on the reservation under the lease, constitute and are an instrumentality of the United States, used by it in the performance of its duties to its Indian wards, and are not subject to taxation by the territory of Alaska. The attempt of the territory to levy and collect taxes on the said property or the packing company is ultra vires and void. Decree in favor of defendent and intervener and against the territory.'

See also Alaska Pacific Fisheries (240 Fed. 281); Territory of Alaska v. Annette Packing Company (289 Fed. 671).

By Executive order of February 27, 1915, the President 'Withdrew from disposal, and set apart for the use of the Bureau of Education, '25,000 acres, including both land and water, surrounding the village of Tyonek near the north end of Cook Inlet in Alaska. The primary object of the reservation was to enable the Department through the Bureau of Education to maintain a school and otherwise care for, support and advance the interests of the aboriginal

natives of the village mentioned whose main support was through hunting, trapping and fishing. The question was submitted by the officers of the Bureau of Education as to the authority for entering into a lease for the establishment of a salmon cannery at or near the village. In Solicitor's Opinion of May 18, 1923 (49 L.D. 592), it was held that such authority existed, reference being made to the similar case of the Metlakahtla Indians of Annette Islands where it was held that the Secretary of the Interior had the power to grant such a lease. Territory of Alaska v. Annette Islands Packing Company (289 Fed. 671). The Solicitor stated among other things:

> 'The fundamental consideration underlying this question is the fact that these natives are, in a very large sense at least, dependent subjects of our Government and in a state of tutelage; or in other words, they are wards of the Government and under its guardianship and care. The relations existing between them and the Government are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the United States.'

It was also held:

> 'By article III of the treaty of March 30, 1867, under which the Territory of Alaska was ceded to the United States, and by subsequent acts providing for their education and support, Congress has recognized the natives of Alaska as wards of the Federal Government, thus giving them a status similar to that of the American Indians within the territorial limits of the United States.

> 'While there is no specific statute relating to the subject, yet the inherent power conferred upon the Secretary of the Interior by section 441, Revised statutes, to supervise the public business relating to the Indians, includes the supervision over reservations in the Territory of Alaska created in the interest of the natives and the authority to lease lands therein for their benefit.'

The Solicitor's Opinion of March 12, 1924 (50 L.D. 315), had under consideration the status of the natives of Alaska with respect to the title to certain tide lands near Ketchikan. Reference was made in that connection to the provisions of the treaty of March 30, 1867, under which the Territory of Alaska was acquired by the United States as well as to the act of May 17, 1884 (23 Stat. 24), which virtually constitutes the organic act for the Territory of Alaska and which declares:

> 'That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.' (Italics supplied.)

The act of March 3, 1891 (26 Stat. 1095), as previously stated, excepts 'any lands . . . to which the natives of Alaska have prior rights by virtue of actual occupancy.' The act of May 14, 1898 (36 Stat. 409), extended the homestead laws of the United States to the Territory of Alaska and authorized the Secretary of the Interior to reserve for use of the natives

of Alaska 'suitable tracts along the water front of any stream, inlet, bay or seashore, for landing places for canoes and other craft used by such natives.' Pursuant to this authority the Secretary on August 5, 1905, reserved the lands described as 'all the lands in the vicinity of the mouth of Ketchikan Creek which lie between the lands occupied by the natives and the limits of low tide of Tongass Narrows.'

It was held in the above Solicitor's Opinion that 'the tide or other lands occupied by or reserved for the Indians at Ketchikan, Alaska, can not be disposed of under existing law, but that power rests with Congress.'

It was also stated in that connection:

> 'From an early date, pursuant to the legislative intent indicated by Congress, this Department has consistently recognized and respected the rights of the natives of Alaska in and to the lands occupied by them. See 13 L.D. 120; 23 L.D. 335; 24 L.D. 312; 28 L.D. 427; 26 L.D. 517; 37 L. D. 334.'

See Solicitor's Opinion of May 27, 1925 (51 L.D. 155), relative to the power of the Territorial Legislature to impose a tax upon reindeer held or controlled by the natives of Alaska.

Reference was made to the case of Territory of Alaska v. Annette Island Packing Company (289 Fed. 671), which involved the question as to the authority of the Territory to tax the output of a salmon cannery under lease by the Secretary of the Interior to a packing company. It was held that the lease was

an instrumentality of the Government to assist the Metlakahtla Indians to become self-supporting and hence the Territory of Alaska could not collect such a tax from the corporation.

It was held in the case of Steamer Coquitlam v. United States (163 U. S. 346):

> ' . . . . Alaska is one of the Territories of the United States. It was so designated in that order and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that Territory. It is, therefore, in every substantial sense the Supreme Court of that Territory . . . . '

Under authority of the act of March 3, 1891 (26 Stat. 826), the Supreme Court of the United States in execution of this law by an order promulgated May 11, 1891, assigned the Territory of Alaska to the Ninth Judicial Circuit.

From the foregoing it is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos and other natives are of Indian origin or not as they are all wards of the Nation and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska, as referred to in the treaty of March 30, 1867, between the United States and Russia, are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States, including the citizenship act of

June 2, 1924 (43 Stat. 253), as Alaska has been held to be one of the Territories of the United States. Under the terms of Article III of the cession treaty of March 30, 1867, the civilized natives of Alaska have all along been citizens of the United States.

Very truly yours,
(Signed) E. C. FINNEY
Solicitor

Approved: February 24, 1932
(Signed) RAY LYMAN WILBUR
Secretary."

No. 7081

United States
Circuit Court of Appeals
For the Ninth Circuit.

TOICHI TOMIKAWA,

Claimant and Appellant,

AMERICAN OIL SCREW "PATRICIA," No. 970-A, her cargo, engines, tackle, apparel, furniture, etc.,

Respondent,

vs.

UNITED STATES OF AMERICA,

Libelant and Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

TOICHI TOMIKAWA,

Claimant and Appellant,

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vs.

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Parker, Stone & Baird Co., Law Printers, Los Angeles

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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For Claimant and Appellant:

MAX SCHLEIMER, Esq.,
355 South Broadway,
Los Angeles, California.

For Libelant and Appellee:

PEIRSON M. HALL, Esq.,
United States Attorney;
ERNEST R. UTLEY, Esq.,
Assistant United States Attorney;
JOHN J. IRWIN, Esq.,
Assistant United States Attorney,
Federal Building,
Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

UNITED STATES OF AMERICA, Libelant,	
against	No. 5567-H.
AMERICAN OIL SCREW "PATRICIA", No. 970-A, her cargo, engines, tackle, apparel, furniture, etc., Respondent.	Citation on Appeal.

THE UNITED STATES OF AMERICA, SS.

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Fransisco, State of California, within 30 days from the date of this writ, pursuant to appeal duly allowed by the District Court of the United States, in and for the Southern District of California, Central Division, and filed in the office of the clerk of said court on September 4, 1934, in a cause wherein the American Oil Screw "Patricia", No. 970-A,

her cargo, engines, tackle, apparel, furniture, etc., and Toichi Tomikawa are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Harry A. Hollzer, Judge of the District Court of the United States, in and for the Southern District of California, Central Division, this 4th day of September, 1934, and in the one hundred and fifty-ninth year of the independence of the United States of America.

Hollzer
United States District Judge

United States of America,)
Southern District of California,)
State of California,) SS.
County of Los Angeles.)

Max Schleimer, being duly sworn, deposes and says that he is of lawful age, and that on September 4, 1934, he personally served Pierson M. Hall United States Attorney, at his office, at the Federal Building, corner of Main and Temple Streets, in the City of Los Angeles, State of California, by delivering to and leaving with John Joseph Irwin, Assistant United States Attorney, copies of the following documents, to wit: Petition for Appeal, Assignment of Errors, Order Allowing Appeal

Fixing Amount of Bond for Costs and Extending Time to File Narrative Statement of the Evidence, Citation on Appeal, Notice of Appeal, Praecipe for Record on Appeal, and Notice of Filing Praecipe, in the case of United States of America, Libelant, American Oil Screw "Patricia", etc., Respondent and claimant, No. 5567-H.

Max Schleimer.

Subscribed and sworn to before me this 4th day of August, 1934.

[Seal] F. H. Whitfield

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original No. 5567-H. United States District Court, Southern District of California, Central Division. United States of America, libelant, vs. American Oil Screw "Patricia", etc., respondent. CITATION ON APPEAL. Filed Sep. 4, 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk. Max Schleimer Proctor for appellants 355 So. Broadway Los Angeles, Calif. TU. 7714

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA, Libelant, vs.	)	No. 5567-H
AMERICAN OIL SCREW "PATRICIA", No. 970-A, Her Cargo, Engines, Tackle, Apparel, Furniture, etc., Respondent.	)	LIBEL OF INFORMATION.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

The United States of America, by Samuel W. McNabb, United States Attorney for the Southern District of California, and Frank M. Chichester, Assistant United States Attorney for said District, brings suit herein in a cause of forfeiture civil and maritime against the American Oil Screw "Patricia", No. 970-A, her Cargo, Engines, Tackle, Apparel, Furniture, etc., and against all persons intervening for their interest therein, and alleges as follows:

I.

That the Respondent, American Oil Screw "Patricia", No. 970-A, Her Cargo, Engines, etc., was seized by

Agents of the United States Coast Guard, Section Base No. 17, on the night of March 23, 1932; that the said vessel was seized for violation of the laws of the United States, and on the date of the filing of this Libel was in the custody of the United States Coast Guard, Section Base No. 17, in the Harbor of Los Angeles, California, and within the jurisdiction of this Honorable Court;

That the said seizure has been adopted by the Collector of Customs of the Port of Los Angeles, California, District No. 27.

II.

That the appraised value of the said American Oil Screw "Patricia", No. 970-A, Her Engines, Tackle, Apparel, Furniture, etc., is Eight Thousand Dollars ($8,000.00).

III.

That on or about March 18, 1932, on application of T. Tomikawa, as owner of the said Respondent Vessel, there was awarded to the said Respondent Vessel by the Collector of Customs for District No. 27 the number 970-A.

IV.

That on or about March 23, 1932, the said Respondent Vessel engaged in a trade other than that for which she was licensed in violation of Section 4377 R. S., 46 U. S. C. A. 325.

V.

That because of the violation of the aforesaid section, 4377 R. S., the Respondent American Oil Screw "Patricia", No. 970-A, Her Cargo, Engines, Tackle, Apparel, Furniture, etc., has become forfeit to the United States of America.

COUNT 2.

I.

Repeats and realleges with the same force and effect as if set out in full herein all the allegations set out in Paragraphs I, II and III of Count 1 of this Libel of Information.

II.

That at the time of the seizure of the said Respondent Vessel, as aforesaid, there was seized aboard the said vessel a cargo of assorted intoxicating liquors; the appraised value of the said cargo of intoxicating liquors is Seventeen Thousand Four Hundred Ninety Dollars ($17,490.00).

III.

That on or about March 23, 1932, a demand was made of the Master, T. Tomikawa, of the said vessel by a duly qualified officer of the United States Coast Guard to produce the manifest of the cargo of the said Respondent Vessel;

That the said Master, T. Tomikawa, failed and refused to produce said manifest in response to the demand of the said officer in violation of Section 584 of the Tariff Act of 1930, 19 U. S. C. A. 1584.

IV.

That because of the violation of the said Section, 584 of the Tariff Act of 1930, 19 U. S. C. A. 1584, the Master of the said Respondent Vessel, T. Tomikawa, has become liable to a penalty of Five Hundred Dollars ($500.00);

That because of the violation of said Section, 584 of the Tariff Act of 1930, 19 U. S. C. A. 1584, the Master of the said vessel, T. Tomikawa, has become liable to a penalty equal to the value of the merchandise seized as the cargo of the said Respondent Vessel.

V.

That because of the violations of the Customs-Revenue Laws of the United States, as heretofore set forth, the said Respondent Vessel has become liable for the payment of the penalties which have attached therefor as provided by Section 594 of the Tariff Act of 1930, 19 U. S. C. A. 1594.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, on behalf of the United States of America, Samuel W. McNabb, United States Attorney for the Southern District of California, and Frank M. Chichester, Assistant United States Attorney for said District, pray the usual Process and Monition of this

Honorable Court to issue against the said American Oil Screw "Patricia", No. 970-A, Her Cargo, Engines, Tackle, Apparel, Furniture, etc.; that all persons concerned or interested in the said vessel, her cargo, engines, tackle, apparel, furniture, etc., may be cited to appear and show cause why a forfeiture of the same should not be decreed; and that all due proceedings being had thereon, this Honorable Court may be pleased to decree for the forfeiture aforesaid; that the said American Oil Screw "Patricia", No. 970-A, Her Cargo, Engines, Tackle, Apparel, Furniture, etc., may be condemned, as aforesaid, according to the Statutes and the Acts of Congress in that behalf provided.

Samuel W. McNabb
SAMUEL W. McNABB,
United States Attorney,

Frank M. Chichester
FRANK M. CHICHESTER,
Assistant United States Attorney.
Attorneys for Libelant.

[Endorsed]: No. 5567-H. In the District Court of the United States for the So. District of California, Central Division. United States of America, libelant, vs. American Oil Screw "Patricia" No. 970-A, her cargo, engines, tackle, apparel, furniture, etc., respondent. LIBEL OF INFORMATION. Filed Apr. 28, 1932. R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

ORDER FOR PROCESS TO ISSUE.

WHEREAS a Libel has been filed in the above entitled case on behalf of the United States of America by Samuel W. McNabb, United States Attorney for the Southern District of California,

IT IS NOW ORDERED that a monition for the attachment of the said American Oil Screw "PATRICIA", No. 970-A, Her Cargo, Engines, Tackle, Apparel, Furniture, etc., described in said libel and set forth in the title of this cause be issued and directed to the United States Marshal of the Southern District of California, commanding the said United States Marshal to take into his possession and custody the said American Oil Screw "PATRICIA", No. 970-A, Her Cargo, Engines, Tackle, Apparel, Furniture, etc.,

AND IT IS FURTHER ORDERED that the said Marshal do admonish and cite any and all persons whomsoever having or claiming to have any title or interest whatsoever in or to said American Oil Screw "PATRICIA", No. 970-A, Her Cargo, Engines, Tackle, etc., to appear in the District Court of the United States, in and for the Southern District of California, Central Division, in the courtroom of the Honorable Harry A. Hollzer, Judge of the said court in the Federal Building in the City of Los Angeles on the return day of said monition, then and there to show cause, if any there be, why the prayer of said libel should not be granted.

AND IT IS FURTHER ORDERED that Monday, the 23rd day of May, A. D., 1932, at the hour of .....

o'clock A. M., be and is hereby fixed as the return day of said monition, and that the said Marshal shall take the return of said monition on said day and at said hour in said courtroom.

AND IT IS FURTHER ORDERED that the United States Marshal for the Southern District of California shall cause public notice to be given of the seizure and of the taking into his possession of the property described in said libel under and by virtue of the said process herein ordered to be issued, and of the time and place assigned for the hearing of said cause, said notice to be given by publication in the Los Angeles News, a newspaper of general circulation printed, published and circulated in the City of Los Angeles within the Central Division of the Southern District of California, the said publication to be for at least two times in said newspaper and the first publication thereof to be not less than fifteen days prior to that assigned herein as the return day for said monition.

Dated this 28 day of April, 1932.

Wm. P. James,
United States District Judge.

[Endorsed]: No. 5567-H In the District Court of the United States for the So. District of California Central Division United States of America, Libelant vs. American Oil Screw "Patricia", No. 970-A, Her Cargo, Engines, Tackle, Apparel, Furniture, etc., Respondent. ORDER FOR PROCESS TO ISSUE. Filed Apr. 28, 1932. R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk.

United States of America)
) ss [Seal]
Southern District of California)

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

To the Marshal of the United States for the Southern District of California, Greeting:

WHEREAS, a libel in rem hath been filed in the District Court of the United States for the Southern District of California, on the 28th day of April, in the year of our Lord one thousand nine hundred and thirty-two, by the United States of America, Libellant, vs AMERICAN OIL SCREW "PATRICIA," No. 970-A her Cargo, Engines, Tackle, Apparel, Furniture, etc., Respondent, by Samuel W. McNabb, United States Attorney for the Southern District of California, in a cause of condemnation, seizure and sale for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said American Oil Screw "Patricia," etc., may be cited in general and special to answer the premises, and all proceedings being had that the said American Oil Screw "Patricia," etc., may for the causes in the said Libel mentioned, be seized, condemned and forfeited to satisfy the demands of the Libellant.

YOU ARE, THEREFORE, HEREBY COMMANDED to attach the said American Oil Screw "Patricia" etc., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same,

or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held in and for the Southern District of California, Central Division, at the Courtroom of the Honorable HARRY A. HOLLZER, Judge of the said United States District Court, in the Federal Building in the City of Los Angeles, State of California on the 23rd day of May, A. D. 1932, at 10 o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

WITNESS, the Honorable WM. P. James, Judge of said Court, at the City of Los Angeles, in the Southern District of California, this 28th day of April in the year of our Lord one thousand nine hundred and thirty-two, and of our independence the one hundred and fifty-sixth.

R. S. ZIMMERMAN
Clerk.

By Edmund L. Smith
Deputy Clerk.

Samuel W. McNabb, U. S. Attorney
Frank M. Chichester, Asst. U. S. Attorney.
Proctor for Libelant.

In obedience to the within Monition, I attached the American Oil Screw "Patricia" therein described, on the 28th day of April, 1932, and have given due notice to all persons claiming the same, that this Court will, on the 23 day of May, 1932 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

Dated April 28, 1932

A. C. Sittel
U. S. Marshal.

By Morris Tovil
Deputy.

[Endorsed]: Marshal's Civil Docket No. 13005½ No. 5567-H Civil U. S. District Court Southern District of California Central Division United States of America, libellant vs. American Oil Screw "Patricia" No. 970-A, Her Cargo, Engines, Tackle, Apparel, Furniture, etc., respondent. Monition returnable May 23, 1932 United States Attorney Proctor for Libelant. Issued Apr. 28, 1932 Filed May 3, 1932 R. S. Zimmerman Clerk. By Theodore Hocke Deputy Clerk.

[Title of Court and Cause.]

ANSWER OF CLAIMANT, TOICHI TOMIKAWA, TO LIBEL OF INFORMATION.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

Toichi Tomikawa, owner and claimant of the oil screw vessel "Patricia", her engines, tackle, apparel, furniture, etc., as the same are proceeded against on the libel of complaint in the above entitled cause, answers said libel of complaint as follows:

AS TO COUNT 1.

I.

The claimant denies the allegations contained in paragraph marked "I" of said libel of complaint, except that on March 23, 1932, the agents of the United States Coast Guard seized the oil screw vessel Patricia, her engines, tackle, apparel, furniture, etc., and everything that was on board of said vessel, and thereafter towed her to the United States Coast Guard Base in the harbor of San Pedro, California, and while she was there in the custody of the agents of the United States Coast Guard, under said seizure, she was seized by the United States Marshall in this proceeding.

II.

The claimant has no information or belief to enable him to answer the allegations contained in paragraph marked "II" of the Libel of complaint, and placing his

denial on that ground, denies all the allegations therein contained.

III.

The claimant denies the allegations contained in paragraph marked "III" of said libel of complaint, except that on or about March 18, 1932, the claimant informed the Collector of Customs, at San Pedro, California, that he purchased the oil screw vessel Patricia and was the owner thereof, and that the said Collector of Customs authorized him to use the number 970-A on said vessel.

IV.

The claimant denies the allegations contained in paragraphs marked "IV" and "V" of said libel of complaint.

AS TO COUNT 2.

I.

The claimant as to paragraphs "I", "II", and "III" of Count 1, which by reference are made a part of paragraph "I", repeats, and realleges, with the same force and effect as if set out in full herein, all the allegations set out in paragraphs "I", "II", and "III" as to Count 1 of this answer.

II.

The claimant denies the allegations contained in paragraphs marked "II', "III", "IV", and "V" of said libel of complaint, except that on March 23, 1932, the agents of the United States Coast Guard seized the oil screw vessel "Patricia", her engines, tackle, apparel, furniture, etc., and everything that was on board of said vessel, and thereafter demanded that the claimant produce the manifest of cargo of said vessel.

AS FOR A FIRST AFFIRMATIVE DEFENSE TO COUNTS 1 and 2 OF THE LIBEL OF COMPLAINT, THE CLAIMANT ALLEGES:

I.

That the claimant at all times hereinafter stated, was, and still is, a citizen of the Empire of Japan.

II.

That on or about March 15, 1932, the claimant purchased the oil screw vessel Patricia from a citizen of the Empire of Japan, her measurements being, length 82 feet, breadth 18.5 feet, draft loaded 8.75 feet; equipped with a Fairbanks Morse engine, 1924, 100 horsepower, and when loaded, her maximum speed is 7 knots per hour.

III.

The claimant, on or about March 18, 1932, informed the Collector of Customs at San Pedro, California, that he was a citizen of the Empire of Japan; that he purchased the said oil screw vessel Patricia; that he also informed him of her said measurements, horsepower engine, and speed; and that he was the sole owner of said vessel, and thereupon the said Collector of Customs permitted and authorized him to use the number 970-A on said oil screw vessel Patricia.

IV.

That the said Collector of Customs had no authority or jurisdiction to number the said vessel under the provisions of Title 46 USCA, Ch. 2, §11, and Title 46 USCA, Ch. 12, §§251, 252, and that by reason thereof

the said numbering of said vessel is of no legal force or effect, and the nationality of the said vessel was, and still is, of the Japanese Empire.

AS FOR A SECOND AFFIRMATIVE DEFENSE TO COUNTS 1 and 2 OF THE LIBEL OF COMPLAINT, THE CLAIMANT ALLEGES:

I.

The claimant repeats and realleges, with the same force and effect as if set out in full herein, all the allegations set out in paragraphs "I", "II", "III", and "IV" of the First Affirmative Defense of this answer.

II.

That on March 23, 1932, the said oil screw vessel Patricia was on the high seas at a place 19 miles off Point San Juan, California, which was a distance over four leagues from the nearest point to land, and that the said oil screw vessel Patricia could not traverse in one hour the said distance, that is to say, from the place where she was then on the high seas to the coast of the United States.

III.

That on March 23, 1932, while the said oil screw vessel Patricia was at the place hereinbefore stated, agents of the United States Coast Guard came on board of her, against the protest and objection of the said claimant, and without any warrant or any other legal process of law, and without any legal right or authority, thereupon seized the said oil screw vessel Patricia, her engines, tackle, apparel, furniture, etc., and everything that was on board of said vessel, against the protest and objec-

tion of said claimant. That thereafter the said agents of the United States Coast Guard towed the said oil screw vessel Patricia to the United States Coast Guard Base in the harbor at San Pedro, California, against the protest and objection of the said claimant. That thereafter the said agents of the United States Coast Guard tied the said oil screw vessel Patricia to the dock at said base and refused to permit her to proceed on the high seas, against the protest and objection of the said claimant.

IV.

That the aforesaid seizure of the said oil screw vessel Patricia made by the said agents of the United States Coast Guard, was without process of law, unlawful, illegal, and contrary to law, and in violation of the rights of the said claimant.

V.

That thereafter, and while the said oil screw vessel Patricia was tied at the dock of the said United States Coast Guard Base, unlawfully, and against the protest and objection of said claimant, the United States Marshall seized the said oil screw vessel Patricia, under the pretended process issued in this action, and took her in his custody, against the protest and objection of the said claimant and in violation of his rights.

VI.

That the aforesaid seizure of the said oil screw vessel Patricia, made by the said United States Marshall, was in violation of law, unlawful, illegal, and contrary to law, and in violation of the rights of the said claimant.

VII.

That by reason of the premises this court has not acquired jurisdiction over the said oil screw vessel Patricia, her engines, tackle, apparel, furniture, etc., and everything that was on board of said vessel.

AS FOR A THIRD AFFIRMATIVE DEFENSE TO COUNTS 1 and 2 OF THE LIBEL OF COMPLAINT, THE CLAIMANT ALLEGES:

I.

The claimant repeats and realleges, with the same force and effect as if set out in full herein, all the allegations set out in paragraphs "I", "II", "III", and "IV" of the First Affirmative Defense of this answer, and all the a*le*gations set out in paragraphs "II", "III", "IV", "V", and "VI" of the Second Affirmative Defense of this answer.

II.

That at the time the agents of the United States Coast Guard approached the said oil screw vessel Patricia on the high seas, aforesaid, the said claimant and master of said vessel did not proceed, or intend to proce*de,* to the coast of the United States, nor to deliver, or cause to be delivered, any goods that was on board of the said vessel, but that the said vessel, at the time and place of the seizure, aforesaid, was in the position only for the purpose of taking bearings in order to ascertain the exact position where the said oil screw vessel Patricia was on the high seas, and for no other purpose.

III.

That by reason of the premises the said oil screw vessel Patricia did not intend to violate any of the laws of the United States, nor did she violate any of the laws of the United States, and therefore this court has not acquired jurisdiction over the said oil screw vessel Patricia, her engines, tackle, apparel, furniture, etc., and everything that was on board of said vessel.

WHEREFORE, the said claimant prays that the libel of complaint be dismissed with costs and judgment be entered in his favor, directing that the oil screw vessel Patricia, her engines, tackle, apparel, furniture, etc., and everything that was on board of said vessel, be returned to him, and that the agents of the United States Coast Guard, or the United States Marshal*l*, be directed to accompany the said oil screw vessel Patricia up to the place where she was seized on the high seas, and be permitted to proceed*ed* on the high seas as to claimant may seem proper, and for such other and further order and relief as to the court may seem meet and proper.

Toichi Tomikawa
Toichi Tomikawa,
Claimant.

Max Schleimer
Max Schleimer
Att'y for Claimant,

Toichi Tomikawa,
609-610 Lincoln Bldg.,
742 So. Hill St.,
Los Angeles, Calif.
TU 7714.

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

Toichi Tomikawa, being by me first duly sworn, deposes and says: That he is the Claimant in the above entitled matter; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

TOICHI TOMIKAWA
Toichi Tomikawa

Subscribed and sworn to before me this)
1 day of August, 1932.)
)
JACK G. SHAPIRO (Seal)
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original No. 5567-H In the United States District Court in and for the Southern District of California Central Division United States of America, Libelant, vs. American Oil Screw "Patricia" No. 970-A, etc., Respondent. ANSWER OF CLAIMANT, TOICHI TOMIKAWA, TO LIBEL OF INFORMATION. Received copy of the within Answer to Libel of Information this 17 day of Oct. 1932 Frank M. Chichester Attorneys for libelant Filed Oct. 17, 1932. R. S. Zimmerman, Clerk By C. A. Simmons, Deputy Clerk. Max Schleimer Att'y for Claimant, Toichi Tomikawa, 609-610 Lincoln Bldg., 742 So. Hill St., Los Angeles, Calif. TU 7714.

[Title of Court and Cause.]

STIPULATION FOR COSTS.

The premium charged for this bond by the Western Surety Company is $10.00.

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, a Libel was filed in this Court on the 28th day of April, 1932, by the United States of America, Libelant, against American Oil Screw, "Patricia," No. 970-A Her cargo, engines, *takle,* apparel, furniture, etc., for the reasons and causes in the said libel mentioned; and

WHEREAS, a claim has been filed in said cause by Toichi Tomikawa as owner of said vessel and Western Surety Company, a corporation organized and existing under and by virtue of the laws of the State of South Dakota, and authorized to do a surety business in the State of California, hereby consenting that in case of default or contumacy on the part of either claimant or surety, execution to the amount of Two Hundred Fifty ($250.00) Dollars may issue against its goods, chattels, and land.

NOW, THEREFORE, it is hereby stipulated and agreed for the benefit of whom it may concern, that the stipulator undersigned is hereby bound to the libelant herein in the sum of Two Hundred Fifty ($250.00) Dollars; conditioned that said claimant shall pay all the costs and expenses which shall be awarded against him by any final decree of this Court, and on appeal, by the appellate court.

IN WITNESS WHEREOF, the stipulator has affixed its name and seal this 23rd day of May, 1932.

[Seal] WESTERN SURETY COMPANY

By P. F. Kirby,

Vice-President

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

On this 23rd day of May A. D. 1932, before me E. D. Tate, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared P. F. Kirby, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] E. D. Tate,
Notary Public in and for said County and State.
My Commission Expires Sept. 15, 1932.

I hereby approve the foregoing bond this 23rd day of May, 1932.

R. S. Zimmerman,
Clerk U. S. District Court, Southern District of California

By Edmund L. Smith,
Deputy Clerk.

AFFIDAVIT OF SURETY COMPANY or AFFIDAVIT OF ATTORNEY-IN-FACT or AGENT OF SURETY COMPANY.

[Endorsed]: 5567-H. STIP FOR COSTS OF TOICHI TOMIKAWA. Filed May 23, 1932 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

AMENDED LIBEL OF INFORMATION

TO THE HONORABLE JUDGES OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

The United States of America, by John R. Layng, United States Attorney for the Southern District of California, and Frank M. Chichester, Assistant United States Attorney for said District, brings suit herein in a cause of forfeiture civil and martime against the American Oil Screw "Patricia", No. 970-A, her Cargo, Engines, Tackle, Apparel, Furniture, etc., and against all persons intervening for their interest therein, and alleges as follows:

I.

That the Respondent, American Oil Screw "Patricia", No. 970-A, her Cargo, Engines, etc., was seized by Agents of the United States Coast Guard, Section Base No. 17, on the night of March 23, 1932, on the high seas at a point ten and one-half (10-1/2) miles southwest true from San Mateo Rocks, off the coast of California; that the said vessel was seized for violation of the laws of the United States, and on the date of the filing of the Libel was in the custody of the United States Coast Guard, Section Base No. 17, in the Harbor of Los Angeles, California, and within the jurisdiction of this Honorable Court;

That the said seizure has been adopted by the Collector of Customs of the Port of Los Angeles, California, District No. 27.

II.

That the appraised value of the said American Oil Screw "Patricia", No. 970-A, her Engines, Tackle, Apparel, Furniture, etc., is Eight Thousand Dollars ($8,000.00).

III.

That on or about March 18, 1932, on application of T. Tomikawa, as owner of the said Respondent Vessel, there was awarded to the said Respondent Vessel by the Collector of Customs for District No. 27 the number 970-A.

IV.

That on or about March 23, 1932, the said Respondent Vessel engaged in a trade other than that for which she was licensed in violation of Section 4377 R. S., 46 U. S. C. A. 325.

V.

That because of the violation of the aforesaid section, 4377 R. S., the Respondent, American Oil Screw "Patricia", No. 970-A, her Cargo, Engines, Tackle, Apparel, Furniture, etc., has become forfeit to the United States of America.

COUNT 2.

I.

Repeats and realleges with the same force and effect as if set out in full herein all the allegations set out in Paragraphs I, II, and III of Count 1 of this Amended Libel of Information.

II.

That at the time of the seizure of the said Respondent Vessel, as aforesaid, there was seized aboard the said

vessel a cargo of assorted intoxicating liquors; the appraised value of the said cargo of intoxicating liquors is Seventeen Thousand Four Hundred Ninety Dollars ($17,490.00).

III.

That on or about March 23, 1932, a demand was made of the Master, T. Tomikawa, of the said vessel by a duly qualified officer of the United States Coast Guard to produce the manifest of the cargo of the said Respondent Vessel;

That the said Master, T. Tomikawa, failed and refused to produce said manifest in response to the demand of the said officer in violation of Section 584 of the Tariff Act of 1930, 19 U. S. C. A. 1584.

IV.

That because of the violation of the said Section 584 of the Tariff Act of 1930, 19 U. S. C. A. 1584, the Master of the said Respondent Vessel, T. Tomikawa, has become liable to a penalty of Five Hundred Dollars ($500.00);

That because of the violation of said Section 584 of the Tariff Act of 1930, 19 U. S. C. A. 1584, the Master of the said vessel, T. Tomikawa, has become liable to a penalty equal to the value of the merchandise seized as the cargo of the said Respondent Vessel.

V.

That because of the violations of the Custom-Revenue Laws of the United States, as heretofore set forth, the

said Respondent Vessel has become liable for the payment of the penalties which have attached therefor as provided by Section 594 of the Tariff Act of 1930, 19 U. S. C. A. 1594.

COUNT 3.

I.

Repeats and realleges with the same force and effect as if set out in full herein all the allegations set out in Paragraphs I, II, and III of Count 1, of this Amended Libel of Information.

II.

That on or about March 23, 1932, the number 970-A granted to the said Respondent Vessel was knowingly and fraudulently used for the said vessel when she was not entitled to the benefit thereof; that the said vessel engaged in trade on said date in violation of Section 4189 R. S., 46 U. S. C. A. 60.

III.

That because of the violation of the aforesaid Section 4189 R. S., 46 U. S. C. A. 60, the Respondent, American Oil Screw "Patricia", No. 970-A, her Cargo, Engines, Tackle, Apparel, Furniture, etc., has become forfeit to the United States of America.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, on behalf of the United States of America, John R. Layng, United States Attorney for the Southern District of California, and Frank M. Chichester, Assistant United States Attorney for said District, pray

the usual Process and Monition of this Honorable Court to issue against the said American Oil Screw "Patricia", No. 970-A, her Cargo, Engines, Tackle, Apparel, Furniture, etc.; that all persons concerned or interested in the said vessel, her cargo, engines, tackle, apparel, furniture, etc., may be cited to appear and show cause why a forfeiture of the same should not be decreed; and that all due proceedings being had thereon, this Honorable Court may be pleased to decree for the forfeiture aforesaid; that the said American Oil Screw "Patricia", No. 970-A, her Cargo, Engines, Tackle, Apparel, Furniture, etc., may be condemned, as aforesaid, according to the Statutes and the Acts of Congress in that behalf provided.

John R. Layng
JOHN R. LAYNG,
United States Attorney

Frank M. Chichester
FRANK M. CHICHESTER,
Assistant United States Attorney

Attorneys for Libelant.

[Endorsed]: No. 5567-H. District Court of the United States, Southern District of California, Central Division. United States of America, libelant, vs. American Oil Screw "Patricia", No. 970-A, her cargo, engines, tackle, apparel, furniture, etc., respondent. AMENDED LIBEL OF INFORMATION. Filed Mar. 29, 1933. R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

HON. HARRY A. HOLLZER, ... JUDGE

UNITED STATES OF AMERICA, Libelant, -vs- AMERICAN OIL SCREW "PATRICIA", NO. 970-A, Her Cargo, Engines, Tackle, Apparel, Furniture, etc., Respondent.	No. 5567-H

Narrative Statement of the Evidence.

Narrative Statement of the Evidence to be used by the appellants on their appeal from the decree in the above numbered and entitled action, and for any and all purposes for which such Narrative Statement of the Evidence may properly be used:

Be it remembered, that this cause came on for hearing on the appellant's objection to the jurisdiction of the court and the motion to quash this proceeding and the seizure made herein by the Coast Guard, before the Hon. Harry A. Hollzer, one of the judges in the above entitled court. The libelant appearing by S. W. McNabb,

United States Attorney, and Frank M. Chichester, Assistant United States Attorney as its attorneys, and said respondent and claimant, Toichi Tomikawa, by Max Schleimer as their proctor. The following testimony and no other was taken and the following evidence, both oral and documentary, and no other was introduced and the following proceedings and no other were had, to wit:

(Proclamation read as follows by Deputy United States Marshal):

"Hear ye, hear ye! All persons having or pretending to have any right, title, or interest in American Oil Screw "Patricia", No. 970-A, attached this 28th day of April, 1932, come into court and answer this libel of United States of America, on pain of being pronounced in contumacy and default, and having the said libel taken pro confesso against you."

MR. SCHLEIMER: May it please your Honor, in case number 5567-H, United States of America versus American Oil Screw "Patricia", I appear especially on behalf of Mr. Toichi Tomikawa, the Claimant, and I file a special notice of appearance, and do not appear generally. I also file a special notice of appearance, a copy of which I serve on counsel. I ask permission to file an objection to the jurisdiction of this Honorable Court and a motion to quash, and in support thereof I file the petition. All these documents show that I appear

specially. I would like to hand up a memorandum to your Honor, and your Honor will pardon me for submitting it in the form as I have it here. I served a copy of it on the District Attorney.

[Title of Court and Cause.]

The following is in the words and figures of the Objection to Jurisdiction and Motion to Quash Seizure and to Dismiss Proceeding.

COMES now Toichi Tomikawa, the claimant in the above entitled cause, appearing specially and solely for the purpose to object to the jurisdiction and power of this court over the said vessel "Patricia", and not intending to submit the said vessel to the jurisdiction of this court, as a party thereto, and moves the court to quash and set aside and to declare void and of no effect the attempted or pretended seizure of the said vessel "Patricia" herein, and all process issued herein against said vessel, and all proceedings had herein against said vessel, upon the ground that at the time of the attempted or pretended seizure of the said vessel herein, the said claimant was, and still is, the sole and only owner of said vessel, and was, and still is, a citizen of the Empire of Japan, and that the said vessel, at the time of the attempted or pretended seizure, was a foreign vessel and on the high sea over 4 leagues from any coast of the United States, and that the said vessel was, at the time of the attempted or pretended seizure, without the bor-

ders and boundries of these United States, and wholly within the borders and boundries of some foreign country or nation, and of such acts and deeds only the courts of such foreign country or nation, and not this court, or any court within these United States, has jurisdiction.

Dated, Los Angeles, California, May 23, 1932.

Max Schleimer

Max Schleimer

Att'y for Claimant, Toichi Tomikawa, Specially as above indicated, Office and Post-office address, 609-610 Lincoln Bldg., 742 So. Hill St., Los Angeles, Calif. TU 7714.

[Endorsed]: Receipt of a copy and filed May 23, 1932.

[Title of Court and Cause.]

The following is in the words and figures of the Petition to Quash Seizure and all process and Proceedings based thereon.

To the Judges of the District Court of the United States, in and for the Southern District of California, Central Division:

Toichi Tomikawa, your petitioner, respectfully shows:

I.

That your petitioner is a citizen of the Empire of Japan, and resides at #336 Fries St., Wilmington, California.

II.

That your petitioner is the claimant of the vessel "Patricia" herein, and appears specially and solely for the purpose of objecting to the jurisdiction of this court, and not intending to submit himself and the said vessel to the jurisdiction of this court, as a party thereto, but solely for the purpose to move the court to quash and set aside and to declare void and of no effect the attempted or pretended seizure of said vessel, and all process issued herein against said vessel, and all proceedings had herein against said vessel, upon the grounds stated in the Objection to the Jurisdiction and Motion to Quash the seizure, etc.

III.

That your petitioner is the owner of the vessel "Patricia" with its engines, tackle, apparel, and furniture, and has been as such since March , 1932.

IV.

That the said vessel is 80 feet in length and 18 foot beam, and is equipped with a Fairbanks Morse Engine, 100 Horsepower, 1924, and has not been registered, enrolled, licensed, or documented under the laws of the United States, and could not have been registered, enrolled, licensed or documented because your petitioner is the sole owner of same and not a citizen of the United States, but is a citizen of the Empire of Japan. Therefore said vessel is a foreign vessel.

V.

That on March 23, 1932, your petitioner was on board of the said vessel "Patricia" and in full charge thereof

as its master, and while the said vessel was on the high sea and located over 4 leagues from any coast of the United States, several officers of the Coast Guard Cutter #259 came on board and arrested your petitioner and his crew, and seized the said vessel against his will and protest.

VI.

That thereafter, and on April 28, 1932, the said libelant filed with the clerk of this court a libel of information against the said vessel, and thereafter, and on April 28, 1932, a monition was issued out of this court returnable May 23, 1932.

VII.

That thereafter, the Marshall of the United States, in and for the Southern District of California, Central Division, seized the said vessel and took same into his possession and custody and the said vessel is still in his possession under said process issued herein.

VIII.

That the said seizure made by the officers of the Coast Guard Cutter #259 was unlawful and in violation of the laws of the United States, for the reason that the seizure of the said vessel was wholly done or performed without the borders and boundries of the United States, and wholly within the borders and boundries of some foreign country or nation, and of such acts and deeds only the courts of such foreign country or nation, and

not this court, or any court within these United States, has jurisdiction, and that because of that, the seizure made by the said Marshall was likewise unlawful and in violation of the laws of the United States, for the following reasons, to wit: That the officers of the Coast Guard Cutter #259 had no legal right, power, or authority to go on board of said vessel and seize the said vessel for the reason that she was then located on the high sea and over 4 leagues from any coast of the United States, and was a foreign owned vessel, as hereinbefore stated, and that by reason thereof this court did not acquire jurisdiction over said vessel, and that the process issued out of this court to the said Marshall to seize the said vessel is null and void, and that the said Marshall is detaining the said vessel against the will and protest of your petitioner and contrary to law.

IX.

That no previous or other application was made to any court or judge.

WHEREFORE, your petitioner prays that the court fix the time of the hearing of said objections and motion and hear the witnesses to be produced in support thereof; that the attorneys for the libelant be notified and that the court direct an order to the said Marshall to return the said vessel, engines, tackle, apparel, and furniture to your petitioner, the property of your petitioner.

Dated, Los Angeles, California, May 23, 1932.

Toichi Tomikawa,
Toichi Tomikawa,
Petitioner.

Max Schleimer
Max Schleimer,
Att'y for Claimant, Toichi Tomikawa, Specially as above indicated, Office and Post-office address, 609-610 Lincoln Bldg., 742 So. Hill St., Los Angeles, Calif. TU 7714.

UNITED STATES OF AMERICA,)
SOUTHERN DISTRICT OF CALIFORNIA,)
CENTRAL DIVISION,) SS.
COUNTY OF LOS ANGELES.)

Toichi Tomikawa, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the contents thereof, and that the same is true of his own knowledge except such matters as are thereon stated on information and belief, and as to such statements he believes it to be true.

Toichi Tomikawa
Toichi Tomikawa.

Subscribed and sworn to before me this 23rd day of May, 1932.

[Seal] Max Schleimer
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Receipt of a copy and filed May 23, 1932.

[Title of Court and Cause.]

The following is in the words and figures of the Special Appearance.

To the Clerk of the District Court of the United States, Southern District of California, Central Division:

PLEASE enter the appearance of Toichi Tomikawa, claimant of the vessel "Patricia" herein, and myself, as his attorney, specially and for the sole purpose of objecting to the jurisdiction of this court, and for the purpose of herein to move to dismiss this proceeding, on the ground that at the time of the seizure of said vessel, the said claimant was, and still is, the owner of said vessel, and was, and still is, a citizen of the Empire of Japan, and that the said vessel was on the high sea over 4 leagues from the coast of the United States.

Dated, Los Angeles, California, May 23, 1932.

Max Schleimer

Att'y for Claimant, Toichi Tomikawa, Specially as above indicated, Office and Post-office address, 609-610 Lincoln Bldg., 742 So. Hill St., Los Angeles, Calif. TU 7714.

[Endorsed]: Receipt of a copy and filed May 23, 1932.

[Title of Court and Cause.]

The following is in the words and figures of the Notice of Special Appearance to Opposing Counsel.

PLEASE TAKE NOTICE that, I, the undersigned, hereby appear in the above entitled proceeding for Toichi

Tomikawa, claimant of the vessel "Patricia" herein, specially and solely for the purpose of objecting to the jurisdiction of this court, and for the purpose of herein to move to dismiss this proceeding, on the ground that at the time of the seizure of said vessel, the said claimant was, and still is, the owner of the said vessel, and was, and still is, a citizen of the Empire of Japan, and that the said vessel was on the high sea over 4 leagues from the coast of the United States.

PLEASE TAKE FURTHER NOTICE, that the undersigned does not appear for any of the other respondents in said proceeding nor does he appear generally for the said claimant, or otherwise than as herein expressly specified.

Dated, Los Angeles, California, May 23, 1932.

Yours, etc.,

Max Schleimer

Max Schleimer

Att'y for Claimant Toichi Tomikawa, Specially as above indicated, Office and Post-office address, 609-610 Lincoln Bldg., 742 So. Hill St., Los Angeles, Calif. TU 7714.

To Mr. Samuel W. McNabb,
United States Att'y., and

Mr. Frank Chichester,
Ass't United States Att'y.,
Att'ys for libelant.

[Endorsed]: Receipt of a copy and filed May 23, 1932.

THE COURT: Is this the matter about which counsel confered in chambers last Saturday?

MR CHICHESTER: Yes.

MR SCHLEIMER: Yes, your Honor.

THE COURT: Then we will set the proceeding down for this afternoon at 2 o'clock.

MR CHICHESTER: At this time we move that the default of all parties not appearing be entered.

THE COURT: So ordered.

(Whereupon an adjournment was had until the hour of 2:00 o'clock P. M. of the same day.)

LOS ANGELES, CALIFORNIA,
MONDAY, MAY 23, 1932.
4:40 o'clock P. M.

THE COURT: United States versus American Oil Screw "Patricia".

MR CHICHESTER: Ready for the Government, your Honor.

MR SCHLEIMER: Ready, your Honor.

THE COURT: We are ready to proceed now in this libel proceeding.

MR SCHLEIMER: We are ready, your Honor, but I don't know how late your Honor is going to hold court today.

THE COURT: Well, we will give you a little time, anyway, as much as we can. I understand that the owner of the boat is appearing here specially, objecting to the court's exercising jurisdiction?

(Testimony of Toichi Tomikawa)

MR SCHLEIMER: Yes, your Honor.

THE COURT: Upon the grounds of the boat being owned by an alien, and upon the further ground the boat was seized more than four leagues off shore?

MR CHICHESTER: That's true, your Honor. I don't know what counsel intends to do in the way of offering evidence as to the distance the boat was from shore at the time of seizure, but as to the other question of alien ownership, I think that question will become moot in the event your Honor finds for the Government; hence, I would suggest that in the order of proof we could dispose of the question of the distance of the vessel from the shore, and we wouldn't have to go into the question of ownership of the vessel.

THE COURT: We rule the burden is upon the party especially appearing to go forward with the proof.

MR SCHLEIMER: Will your Honor grant me an exception?

THE COURT: Yes.

MR SCHLEIMER: Mr. Tomikawa.

TOICHI TOMIKAWA,

called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

In answer to MR SCHLEIMER:

My name is Toichi Tomikawa. My business is fishing. I remember the 23rd day of March, 1932. I was on a vessel known as Patricia. I was the master of that vessel on that day. On March 23, 1932, between half past two and three o'clock. In the afternoon. I was

(Testimony of Toichi Tomikawa)

taking my bearings and location to ascertain where I was. I looked at the highest point of Catalina Island. About the middle of the island. And I find out the point, how many miles it is, where I was. I find out my place about 10 miles distant from the point up to the time when I started. I used a compass to determine my distance by sighting the highest point on Catalina Island. It was about half past two. In the afternoon. It showed on compass west one-quarter north. And some one point north northeast. In other words, my compass pointed northeast towards San Juan Point, and northwest one quarter to the highest point on Catalina Island. I had intentions to stop the engine. Now, after I looked at the compass I took out chart and figured out to indicate. At time the cutter came alongside of my boat I was at this place. (Indicating).

(Counsel marks letter A)

Place marked A when you first saw the Revenue Cutter. My boat was at the mark A. Yes that was where the Revenue Cutter came alongside of my boat. I have been fishing more than 15 years, operating boats, and I was on it the master and operator, my own self. I know how to take measurements on a map of this kind. By 15 years experience. I took the measurements on the map to find out what position my boat Patricia was at the time the Revenue Cutter came alongside of it. I saw this place, highest point at Catalina Island.

(Marked B)

I saw at that time on compass west one quarter north, and on other side of the boat I saw mountain. Santiago Peak. Then, on the chart I make two lines from two

(Testimony of Toichi Tomikawa)

places what I saw on compass. I mean the lines from A to C, and from A to B. I used this instrument. I moved it like this way. I kept this point here, and moved this one, and hold this by moving this one, and then come to the center of the compass.

Q BY THE COURT: What does that chart show?

A That is the direction of compass on this chart.

MR SCHLEIMER: With your Honor's permission I will mark that.

THE COURT: Yes.

(Counsel marks on map.)

THE COURT: D represents the direction of compass bearings on the chart.

Q BY MR SCHLEIMER: Now, after you had done what you have indicated, what else did you do?

A Now, I see this point.

MR SCHLEIMER: Wait a minute, please. Indicating the point marked B?

A I used the instrument like this is.

Q You used the same instrument?

A According to what the compass shows.

Q. What do you call this instrument here?

A I don't know, but this is used to make two lines.

Q Now, go right ahead, will you?

THE COURT: You moved the measuring device down to this same portion of the chart which is marked D?

Q BY MR SCHLEIMER: That is here, you moved it over here?

A Yes.

(Testimony of Toichi Tomikawa)

Q And then, what did you do?

A Then I find out these two lines from highest points to my place.

Q Indicated by A?

A And from Santiago Peak I could see to point A. Those two lines, when two lines cross, that is location where I was.

Q You mean by that when those two lines commencing from B to A and C to A, when they come close together, that indicated the position where your vessel was at that time?

A Yes, sir.

Q All right now, will you tell us what is the distance, if you know?

A Yes, sir.

Q From A, from the letter A as indicated in red pencil to—where is San Juan Pt. here?

A. That is the point. (Indicating.)

MR SCHLEIMER: May we mark that E?

THE COURT: Yes.

(Counsel marks on map.)

Q BY MR SCHLEIMER: Now, will you tell his Honor the distance from A indicated in red pencil, the letter A, to the place indicated in red pencil E on this map?

A That was, I remember, 19 miles from the shore, off San Juan Point.

MR SCHLEIMER: I offer this map in evidence, may it please your Honor.

THE COURT: Will you ask him if that is the chart that he had with him on the boat?

(Testimony of Toichi Tomikawa)

In answer to MR SCHLEIMER: I did not have this chart with me on the boat. I used the same kind of chart on the boat. I did not take the chart along when they took me off the boat Patricia.

THE COURT: Well, we will mark it then as Claimant's Exhibit.

MR CHICHESTER: May it please the Court, I would like to ask a question of the witness on voir dire if I may.

THE COURT: Very well.

VOIR DIRE EXAMINATION

BY MR CHICHESTER:

Q How do you know that the lines which you have marked on the chart which is offered in evidence, the lines marked AC and AB are marked in the same direction as the lines on the chart that was on the boat?

A I don't know.

Q In other words, how do you know that these lines that I am indicating are in the same direction on this chart as on the chart when you had it out on the boat?

A This is about the same chart that I used.

DIRECT EXAMINATION (Cont'd)

BY MR SCHLEIMER:

Q Is it the same or another kind?

A It must be the same.

Q There is only one chart used by the Government, isn't that right?

A Yes.

MR CHICHESTER: I don't mean that. I mean, tell the judge, how do you know that these here lines

that you have made here are the same as the lines on the other chart that you made on the boat?

A Now, this chart is issued by the Government office, and the other is issued by the Government office, but I don't know whether this is the same.

THE COURT: Well now, the chart that you had on the Patricia, has that got some lines drawn like this from A to B and A to C?

A. No, sir, if we marked like this every line we couldn't use the chart in the future, so we don't have to mark it at all.

Q In other words, the chart you had on the boat was not marked with lines AB and AC? You simply figured this out without drawing any lines when you were on the boat? Did you have a rule like that on the boat?

A Yes.

Q Is that the rule you had on the boat?

A About the same size I had on the Patricia.

Q But you left it on the boat?

A Yes.

Q BY MR SCHLEIMER: Did you have another instrument besides that? You had another one just now?

Q BY THE COURT: Did you have a compass on the boat?

A Yes.

Q And you had a rule like this you are holding in your hand?

A Yes.

(Testimony of Toichi Tomikawa)

Q BY MR SCHLEIMER: Did you have one like that also?

A Yes, a compass.

THE COURT: Now, when you took your measurements on the boat, did you write them down anywhere?

A I write them in my mind, sometimes make a memorandum.

Q Did you make a memorandum that day?

A I think so, but I don't have it.

Q You haven't got it?

A I don't have to. I keep it in my mind.

Q Well, do you remember whether you saw a memorandum which you made on March 23rd?

A What is it?

MR SCHLEIMER: His Honor wants to know, do you remember if you made a memorandum on March 23rd?

A Yes, I keep it in my mind.

Q The Court wants to know whether you made a memorandum in writing?

A On a little scratch paper, small piece of paper, but it wasn't so much important.

Q The Court asked you what did you do with that piece of paper.

A I don't know what I have done with it.

Q BY THE COURT: When was the last time you saw the paper?

A At the time I finished, after I make the indications on this chart and leave it on the table.

(Testimony of Toichi Tomikawa)

In answer to MR SCHLEIMER:

The eating table. In the cabin. The Patricia cabin where I draw on this chart. I mean to tell the Court that in the cabin of the Patricia there is a table. I made my calculations to find out where I was upon the chart on that table. I made a memorandum. I left it on the table.

MR SCHLEIMER: May we offer this in evidence, your Honor, at this time?

THE COURT: We will mark it Intervenor's Exhibit A.

MR CHICHESTER: We object to that offer on the ground it is incompetent, no proper foundation laid as to its authenticity as to the directions, or as to the memory of the defendant in reaching his calculations in making the map.

THE COURT: Well, we are receiving it merely for the purpose of illustrating the witness's testimony. You will proceed.

In answer to MR SCHLEIMER: I did not hear whistle before the Coast Guard Cutter came alongside of the Patricia. First I saw the Revenue Cutter on the port side of my vessel. She turned around and came to my starboard. I was standing waiting on that side, and I seen the Coast Guard vessel was quite close to us, and I see their motions to make us stop the boat and at the same time I heard the whistle. We stopped our engine; no, not stopped the engines. We stopped the running of the boat. Then, the Coast Guard came alongside of our vessel and one man jumped in; one man from

(Testimony of Toichi Tomikawa)

the Coast Guard vessel went on board my vessel. I can point out the man in the court room that came on board my vessel.

THE COURT: Let the record show the witness identifies Mr. Blondin as the man who came on board the Patricia from the Coast Guard Cutter.

In answer to MR SCHLEIMER: Two or three more come on board after that. I don't remember exactly, but less than two. They told me and the crew to get on board their vessel, the Revenue Cutter. The crew and I got on the Revenue Cutter.

THE COURT: Q The Coast Guardmen looked over your boat?

A Yes, I think.

Q Now then, was your boat towed in by the Coast Guard cutter?

A Yes.

In answer to MR. SCHLEIMER: It took them about 20 minutes from the time I got on deck of the Coast Guard to tie the Patricia to their boat in order to start the towing. After they tied the vessel Patricia to their boat, they went in direction I believe to the nearest point nearest mainland. I think northeast direction. The revenue cutter was going about 7 every hour; that's known by my long time experience, because I always operate the speed the same. The revenue cutter started to tow the Patricia. between 3 and 3:30. She was

(Testimony of Toichi Tomikawa)

turned this way, and this way and this way (indicating). The first time, I believe, east, northeast, they were running. And then about northeast. At 7 o'clock they came to nearest place to shore; it was San Juan point. I saw that. From the time the Coast Guard cutter started to tow the Patricia and up to the time we reached the point of San Juan I saw vessel in sight. That was not earlier than 4 o'clock. That vessel was going southeast. I was at that time when I saw this vessel on the deck of the Coast Guard cutter, top of the engine place; that was where they ordered me to stay. I saw a steamship. Its hull was painted black, a two tan colored mast. Tmo masts. It *loked* like a passenger steamer, and the funnel had the same color. The mast, and I saw a special mark on the chimney. I am able to understand what company's steamship it is. I believe it is Admiral Line. That steamer crossed bow of the revenue cutter that was towing in the Patricia. When it was nearest it was the distance that I can see the mark of the company. The distance was about a mile and a half or two miles, not all of two miles.

THE COURT: I think we will have to take a recess.

MR. SCHLEIMER: All right, your Honor; until when?

THE COURT: This case will be continued to 3:30 P. M. tomorrow afternoon, to which time the witnesses are directed to return.

(Testimony of Toichi Tomikawa)

Los Angeles, California, Tuesday, May 24, 1932.
4:45 o'clock P. M.

TOICHI TOMIKAWA,

recalled as a witness on behalf of the claimant, having been heretofore duly sworn, testified as follows:

DIRECT EXAMINATION

In answer to MR. SCHLEIMER:

The coast was about two miles before the revenue cutter turned towards Pedro, when we approached point San Juan. I think they turned to San Pedro, their course. About 7 o'clock. The revenue cutter reach San Pedro Lighthouse about 12 o'clock that night, midnight. The revenue cutter reach the Base at San Pedro about 1 o'clock in the morning. I am the owner of the "Patricia". About the 17th, between the 15th or 17th of March, this year. I am not a citizen of the United States.

In answer to THE COURT: I was born in Japan.

In answer to MR. SCHLEIMER: I did not have that vessel "Patricia" registered or enrolled with the Customs House in the United States.

MR. SCHLEIMER: You may cross examine.

CROSS EXAMINATION

In answer to MR. CHICHESTER:

I recall the chart that we had here yesterday and to certain lines that were drawn on it. I remember the letters A, B, C, D, and so on. It was about 2:30 in the afternoon of March 23rd when the Coast Guard boat

(Testimony of Toichi Tomikawa)

came alongside my boat. At the time, about 1 o'clock on that day, we could not see so far distant because it was hazy. Before 1 o'clock it was hazy on that day and I could not see very, very far distant, but after that time we can see more and clear. It was not quite clear after 1 o'clock. About 2:30 we look many thousand feet, high place, we can see about 25 or 30 miles. When we see from this side (indicating) there is many places. We can see the top of the mountains on Catalina Island. I could see the tops, more than one top, but the highest. I was looking at Catalina Island from the point marked "A". I saw a number of peaks on Catalina Island. One of them appeared to be higher than the others. I took that peak to be Peak "B". The height of this Catalina Island is about 2000 feet and not so many, so when you look from San Pedro, looking from "A" point, about the center—this is the center of the Island (indicating). I can tell if that is the center of the Island when I am at a distance of 25 or 30 miles. I was working on this sea more than 15 years and by this experience I can judge about. You do not understand. Haze sometimes lays up high, but sometimes very low. On that day, in the morning by 1 o'clock in the afternoon, before 1 o'clock, this haze covered the high places, but about 1 o'clock, the haze was cleared up.

In answer to THE COURT: At 1 o'clock the haze has cleared up on the high places.

In answer to MR. CHICHESTER: I have not been at Santiago point. I have not been on top of there. This is the highest point on this chart (indicating), about this direction (indicating), so while we are navi-

(Testimony of Toichi Tomikawa)

gating we must remember about this point. I stated that the distance from "A", marked on the chart, to the point "E", which is San Juan point, is a distance of 19 miles, or it is my understanding from this chart that at the time I was boarded I was 19 miles from San Juan point. It was about 2:30 in the afternoon of March 23rd when the Coast Guard boarded my vessel; might be about 5 or 7 minutes. It was after 2:30 in the afternoon, about 6 or 7 minutes. The Coast Guard came alongside Patricia and came aboard my boat about 2:40. It took about 20 minutes when we got on the deck of the Coast Guard. They started towing in this direction (indicating). I think it was northeast, north about, I suppose. I said yesterday that they started to tow the Patricia east northeast. Then they changed their course down this way (indicating on chart), and then this way (indicating) and this way (indicating). They changed the direction many, many times, so I cannot explain exactly but I can say about. Then turn about 7 or 10 degrees difference to those, I suppose on the compass. I stated I saw San Juan point. It was this side (gesticulating), the starboard side. I stated on direct examination that we were 2 miles away from the point, approximately. I stated on direct examination that an "Admiral Line" vessel crossed the bow of the Coast Guard vessel. It came from my left side. I suppose it came from San Pedro to San Diego. When I saw the vessel of the Admiral Line she was about thirteen and a half miles from the shore. I stated that from my experience as a seaman of over 15 years. I judged the speed of the Coast Guard boat and the Patricia in

(Testimony of Toichi Tomikawa)

tow to be about 6 or 7 miles an hour. It was about 4 o'clock in the afternoon when I saw the Admiral Liner. It was about 3:20 or 3:30 when they put a line from my boat on to the Coast Guard boat. That was about 19 miles out. From 3:30 until 7 o'clock, is three and a half hours. We were traveling at between 6 and 7 miles an hour. We laying at point "A". It takes nearly one hour. Until the tow started, one hour. Boat or anything don't stay at one spot; current and breeze and wind will carry it along; that makes a difference in your figure. Some time it make a difference of over a mile. If it is a pretty high wind. If Coast Guard runs 7 miles an hour, three hours and a half would be about 25 miles. If Coast Guard runs 6 miles, that would be about 21 miles. This Coast Guard did not take direct course, but changed course all the time; that will make distance longer. I do not know how many miles. But from this point to this point (indicating)—by this point to this point (indicating), shortest line, and if we come this way it must be longer than the shortest line. From 3:30 until 4:00 we must have traveled around about 4 miles. I know it was 7 o'clock when we came off point San Juan. I set my boat time at sunset, my clock on the boat at sunset; it was 6:20. I set my clock with sunset. I guess at the time when I set my clock. It is about right. It is a pretty close guess. About 2 o'clock in the afternoon of March 23rd I was watching the movement of the boat in the pilot house. I was in the pilot house. I watching in the same place. Hirata standing by me. Frank Oraeb was sleeping in the bunk. Then, I suppose, "A" gave the position where it is—if the

(Testimony of Toichi Tomikawa)

boat move—if we stay on the one place, we can see one direction; we cannot see where it is; we know only direction, but even if I move the boat some distance, then we can know where we are; then we can get the position of the boat. The direction my boat was moving in we went between two points. This way straight (indicating on chart); that is north and southeast. The bow headed northwest, the stern southeast, proceeding at 7 miles an hour at about 2 o'clock on March 23rd. I went to start the engine, start the running, about 1 o'clock. 1 o'clock, and if I run about an hour and a half it must be about 10 miles, and if I move the 10 miles with southern direction, then I can understand on chart where this boat is. At 2:30 I was in the pilot house. I first saw the Coast Guard boat on the starboard side. It was just 2:30. 2:30 was the time I found out the place, so it is sure. I look at the clock then. The reason I took position and make a notation, as I said before, it was hazy and I take a chance to look at some certain point to get the position; if the evening come—if the haze come you cannot see very well.

MR. CHICHESTER: That is all.

REDIRECT EXAMINATION

In answer to MR. SCHLEIMER:

I said that I was in the pilot house about 2:30. Before I was in the pilot house I was at the table in the cabin. I opened the map and indicated the position. I did not start the engine about one o'clock. I started the start.

(Testimony of Toichi Tomikawa)

Q Was the boat running up to one o'clock, or was it not?

A What is it, please, once more? Before one o'clock we were drifting. About one day and night. A day and night—22 or 24 hours. We were drifting between Oceanside and Clemente and Catalina. I figured this way (indicating), around this course this way, southeast (indicating). This way, please (indicating). This is "A"; that is where we were at 2:30 on March 23, 1932. The other point is here, about (indicating). At this place I found out, at 1 o'clock, one twenty south, and the last twenty-four hours may be moving about this direction (indicating). I think, might be moving between 7 or 10 miles. It must be from this way, southeast (indicating). From San Pedro towards the ocean, towards San Diego.

MR. SCHLEIMER: I believe that is all.

RECROSS EXAMINATION

In answer to MR. CHICHESTER:

I did not have any flag on the Patricia at any time on March 23, 1932; we were not flying any flag of any nation. The deviation of my compass on the Patricia on March 23rd maybe one more or less difference. Cannot say what is exactly. I believe it is the same as the chart. I do not know how long before had it been tested because I owned that boat not a long time. Just a short time. So I do not know when that compass was tested. I figure some deviation when I was taking bearings on this chart, but I trusted the compass. And did not allow for any deviation.

(Testimony of Shinajiro Hirata)

MR. CHICHESTER: That is all.

MR. SCHLEIMER: That is all.

THE COURT: We will have to continue this matter. We suggest that the hearing in this libel here be resumed on Thursday, May 26th, at 10 o'clock.

The further proceedings in the case of the United States versus American Oil Screw "Patricia" will be continued until Thursday morning at 10 o'clock. All witnesses will return here without further notice.

Los Angeles, California, Thursday, May 26, 1932.
10:00 o'clock A. M.

SHINAJIRO HIRATA,

called as a witness on behalf of the claimant, being first duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

In answer to MR. SCHLEIMER:

I was born in Japan. I am not a citizen of the United States. I am a citizen of the Japanese Empire. My business is seaman. I have been a seaman about 16 or 17 years. During the 16 years that I have been a seaman I have been a seaman in this country off the coast of California.

THE COURT: Q Well, you mean you have worked as a seaman for 16 years off the California coast?

A Not always, but I worked about 16 years this coast.

Q You have worked along this coast for about 16 years?

A Yes.

(Testimony of Shinajiro Hirata)

THE COURT: The answer is yes?

A Yes, sir.

MR. SCHLEIMER: Q You mean steady or on and off??

A I can't get it.

Q You mean steady, or on and off of this coast?

A Oh, you mean—no, not always steady.

THE COURT: Q Well, what other coast have you worked on?

A Well, that is California coast near and around San Pedro.

THE COURT: I guess that is sufficient. Let's go ahead.

In answer to MR. SCHLEIMER: I recall March 23, 1932. I was on Patricia that afternoon. I just was standing by pilot house and steering once in a while. I just once in a while, you know, just steer. Steering the boat. I remember when the Coast Guard Boat 259 came alongside of the Patricia. It was coming alongside at 2:30 in the afternoon. Mr. Toichi Tomikawa was in the pilot house the same, standing beside where I was. Well, he was in the cabin, and come back to the pilot house. The cabin from the pilot house is just one partition there, and only about 5 or 6 feet further he was. He was in the cabin, he took chart and put it on the table where we were eating, and he used an instrument to measure something. I saw him—he take chart, I mean he take a chart and put it on the table and he used instrument and measuring and he tried to get position of where Patricia was. Well, he looking, he looked at the compass and he just get the direction with that, Catalina Mountain, what direction

(Testimony of Shinajiro Hirata)

he was looking first. And he looking on starboard side, you know, further out the mountain, Santiago Peak, the largest points, and just the same thing he do to the Catalina Island.

Q BY THE COURT: What was the other peak?

A Santiago Peak; I don't know exactly the pronunciation.

THE COURT: All right.

In answer to MR. SCHLEIMER: He went in the cabin. When Mr. Tomikawa had done the things that I have described, at that time, 2:30, Patricia was 24 miles from Catalina and 19 miles from San Juan Point. It is direct from Patricia, compass point northeast Santiago Peak and west one-quarter point north Catalina Mountain. I was in the pilot house at the time that the Coast Guard boat came alongside of the Patricia. One person came on the boat. This gentleman asked who saw the little boat floating— This man working on Coast Guard boat. I didn't know him. The man from the Coast Guard that came on board said that to me. Of course, I didn't see—I never say anything.

THE COURT: Now, one minute. What did this man from the Coast Guard boat ask you?

A Little boat, seen any little boat around here maybe wrecking?

Q Leaking?

A No, break down.

THE COURT: Break down, all right.

In answer to MR. SCHLEIMER: I see after captain of the Coast Guard 259 come on board, after that I don't remember exactly how many people, maybe 2 or 3 or

(Testimony of Shinajiro Hirata)

more; I don't remember. Frank Oreb was at the time in bunk, what do you call place for sleeping. When they came on board from the Coast Guard arrested. Before the Coast Guard people arrested me captain just jumped in the boat and ran back and call 259 Coast Guard boat; it come alongside Patricia, and at same time he hold the gun and I was arrested. I saw the Coast Guard people that went on board go in the cabin. I am outside; I don't see after they get in, but he saw Frank Oreb and maybe saw them in the cabin, but I don't know *exatcly*. I was outside of the cabin. . The Coast Guard people order me, Mr. Tomikawa and Frank Oreb to go on board of the Coast Guard boat. All three of us went on board of the Coast Guard boat. They place me on back at the end. There was a man standing there watching me. Mr. Tomikawa was placed behind the cabin, about the center of the boat.

Q Was there also a guard placed there to watch him?

THE COURT: Well, why go into those details? There isn't any doubt about the fact that the Coast Guard cutter seized this boat Patricia and placed the witness and the owner of the boat and Mr. Oreb on board the cutter and brought them into port. Now, let's omit those details about which there is no issue.

MR. SCHLEIMER: All right, your Honor.

In answer to MR. SCHLEIMER: They tied the Patricia to the Coast Guard boat. It took them about 10 or 15 minutes. The Coast Guard boat started to proceed in direction of shore, these people not taking same course. I remember they changing many, many courses, you know, but Coast Guard, I suppose they were close to shore any-

(Testimony of Shinajiro Hirata)

way. We got there about 7 o'clock. They proceeded in direction northeast by east, and then change northeast and northeast by north, and north northeast and north-northeast, north; after end of time I saw that the boat was clean around and headed north once, headed north by west, and I saw the San Juan point was about 2 miles out at that time. I watch this point but I don't know exactly how many hours they keep the same course. The Coast Guard boat was about 2 miles from San Juan about 7 o'clock. I saw a steamship while I was on board the Coast Guard boat. She passed the bow of the Coast Guard boat about 2 mile away. I mean steamship passed coast guard bow about 2 miles away. It was a little after 4, or 4 o'clock. After reaching San Juan, direction San Pedro, the Coast Guard boat arrived at the Lighthouse at San Pedro 12 o'clock midnight. The Coast Guard proceeded after that to Coast Guard Base; reached there 1 point of San Juan Point. We are outside the steamship, passing by, or passing the bow of the Coast Guard boat, that steamship was between the Coast Guard boat and the point of San Juan Point. We are ouside the steamship, and steamship between San Juan and Coast Guard boat. I saw the color of the paint on that steamship. It was black color. She had two masts. The color of the masts was something like bright color, but I didn't see; didn't see. Something like very light color. She had one funnel. I saw on that funnel something like a big ring that only the Admiral Line mark have on chimney and a round ring. It was Watson. I know it was the Watson. One boat pass for San Diego. I find after 3 or 4 days this is surely the Watson, see by the paper.

MR. SCHLEIMER: You may cross examine.

(Testimony of Shinajiro Hirata)

CROSS EXAMINATION

In answer to MR. CHICHESTER: I looked in the newspaper and checked up on that I saw on the funnel. Just look like, come little higher than chimney face, what do you call it? I see face and those things show like that, and higher spot like a ring around. I cannot say the color of that right, but very bright; it's too far away for this ring, all I could see was the ring; I couldn't see any color or anything of that sort. I know it was an Admiral Line vessel. This is very easy to me, but very hard to explain all about. Excuse me, please, but I know masts, I can tell if there was Dollar Line or was fishing boat, or was Yale or Harvard, or was City of Los Angeles; only my experience. I cannot say like Packard or Studebaker, or just what it is; I cannot explain. The Admiral Line insignia bears the flag on the funnel, or carry a flag on it. I did not see the flag. I did not see any flag.

THE COURT: Let's mark this drawing.

MR. CHICHESTER: Yes, we will offer that in evidence as an explanation of the witness's testimony. As Government exhibit—

THE COURT: Government exhibit 1.

In answer to MR. CHICHESTER: I stated I had been going to sea for 16 or 17 years; not straight; approximately that time. I did not have any financial interest in the Patricia; not any. I work shares, after we get fish. I work on shares of the fish we catch. We were not fishing this day. I say it was about 2:30 in the afternoon when the Coast Guard vessel came alongside of the

(Testimony of Shinajiro Hirata)

boat. There was a clock on board the vessel. It was in the cabin. I was in the pilot house. I could see the clock through the open door clear. Mr. Tomikawa, at 2:30 in afternoon, was in cabin and come back to the pilot house and stood at the side. Stood at my side in the pilot house. He was in the cabin and at the time the Coast Guard come, he come back to the pilot house. I stated he had a chart on the table and was taking a position, just before 2:30. That was just a few minutes before 2:30. We had three compasses, that was one in pilot house, and one on roof of the pilot house, and one somewhere in the cabin. It is used for something just to bring it out on the deck. This time I don't remember where they keep it. It's a movable one. You can move it around anywhere. It was some place in the cabin. I saw Patricia compass direct Catalina Mountain west one quarter north. I was just watching him. I was steering the boat, but he doing that, and besides I know just about where I am at; I knew where I was. I knew where we were. Mr. Tomikawa said, we are about same position yesterday about this time. He said it was about the same place as we were yesterday at that time, is what he said. I said uh-huh. I said uh-huh, that means just give an answer. We kept a log on that vessel. I did not make any notations on the log at that time. Mr. Tomikawa did not make any notations in the log at that time. I did not make any notations in the log the day before when we were in that same position.

Q No notations were made in the log at any time concerning the position of that vessel. Isn't that correct?

A I can't understand you.

(Testimony of Shinajiro Hirata)

No notations were made in the ship's log concerning the position in the water at any time. Mr. Tomikawa just uses the chart, and he get the position. I see something he wrote down, and at the same time he told me where we were, and my mind just decide that so I give the answer. Nothing was put in the log. The log is now on the Patricia. It's on the boat now. When the Coast Guardsmen came on the boat, the first thing asked was, "Did you see a little boat floating or wrecking?". I said I didn't see anything.

Q What else did he say?

A He asked the number of the boat.

I give him the number, 970-A. He wanted to see—what do you call the registration papers? The papers of the vessel. He did not ask me for a manifest. He didn't ask for that. He asked for my papers. I told him I didn't have any. Then he said, "Thank you," and goes out of cabin. He walked out on the deck and walked toward the back end of the ship. It looked like he call the 259. And 259 came to the Patricia and just comes close like this, and gets alongside the Patricia, but behind it. I think this gentleman, the captain, he jump into the Patricia and he open the hatch and lifted it back, then called 259, because 259 drift about 200 feet, you know, and big ocean there, it come alongside the Patricia. Then they had us arrested. The captain of the Coast Guard vessel said, "You have whisky". I said, "Yes."

THE COURT: Now, one moment, we are having difficulty in getting some of the answers of this man.

MR. CHICHESTER: I beg your Honor's pardon.

(Testimony of Shinajiro Hirata)

THE COURT: Speak up a little louder, please. Mr. Reporter, will you read the last four questions and answers?

(Last four questions and answers read.)

In answer to MR. CHICHESTER: It took the Coast Guard boat, to tie up to the Patricia and start towing, about 20 minutes. Just proceeded to shore, but I can't say just the point, but many points. He take course too many points. I guess average, that is towing time, they average—they change speed two, three or four times, first faster, then slower, then faster, oh, I believe 6 miles. He asking the engineer, and I hear him answer two or three times different. The captain ask the engineer how many number like this, then engineer say 500, 400, 600. I am referring to revolutions per minute. I think so. I was away back in end of boat, on the port side, on the Coast Guard boat. When the Coast Guard boat first came alongside the boat that I was on, the captain of the Coast Guard boat called to me and asked me what I had aboard I answered that I had a load of abalones.

MR. CHICHESTER: I believe that's all, your Honor.

REDIRECT EXAMINATION

In answer to MR. SCHLEIMER: When the Coast Guard boat started to tow the Patricia, they were steering just near the place I sit down, from the back, big ladder, to keep boat straight, and there is a big post, not big post, but just this much post come out on deck. It is called among seamen emergency steering. It was not steered from the wheel house; just used on the outside steering things from the cabin; it's cable break somewhere. I mean that the steering cable broke or was broken at that time. The

cable connection in the pilot house. That is the reason they were steering from the back of the boat. I don't know exactly how many hours.

MR. SCHLEIMER: That's all, Mr. Hirata.

MR. CHICHESTER: Just one moment please, one question.

RECROSS EXAMINATION

In answer to MR. CHICHESTER: I don't remember the first man that boarded the vessel, Mr. Blondin asked me where the captain was, and I don't remember telling him that the captain was in Turtle Bay. At the time I was aboard the Coast Guard vessel and they started towing the Patricia, I was on the outside of the pilot house on the Coast Guard vessel in the port quarter, the upper end of the boat. I could not see from where I was on the Coast Guard boat the instrument that recorded the speed of the motor of the Coast Guard boat.

MR. CHICHESTER: That's all.

REDIRECT EXAMINATION

In answer to MR. SCHLEIMER: I remained in the back of the Coast Guard boat about 3 hours, I guess, since I was on the boat until we got to San Juan point, and just 15 minutes I was inside to eat and I come out, you know, but always I sit in just the same position. After 7 o'clock I sit inside the boat where they are eating. I was there 7 o'clock to 1 o'clock.

MR. SCHLEIMER: That's all.

MR. CHICHESTER: That's all.

MR. SCHLEIMER: Step down please.

Mr. Beckwith.

(Testimony of W. N. Beckwith)

W. N. BECKWITH,

called as a witness on behalf of the Claimant, being first duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

In answer to MR. SCHLEIMER: I reside at San Pedro. I am shipmaster. Have been such 22 years. I am a licensed shipmaster. I have also been in the Navy. Lieutenant-Commander Confirmed in the Navy. I was also commanding officer of various vessels during the War over-seas. I have traveled on the coast from San Pedro toward San Diego. I am a pilot for that district. For a great number of times in the past 22 years. I know the Admiral Line. The color of their boats is black, yellow funnels and yellow masts. They have an insignia on the funnel; the flag painted on the funnel in a circle. They have the flag painted on the funnel in a circle on either side. I know the course that line takes proceeding from San Pedro lighthouse toward San Diego. The course they take is about southeast, three-quarters east. I am familiar with the point of San Juan. There are a few outstanding rocks there. Any steamship line goes from San Pedro to San Diego, and vice versa, leaving closely from the break-water, the light at the break-water at San Pedro and proceed to the sea buoy which is about 2 miles southwest of Point Loma off San Diego; between the sea buoy and Point Loma is a kelp bed which is dangerous for navigation. That course from there is 322 degrees from San Diego to San Pedro. I use the points. That is a very crude way. In navigation they use degrees, not points, and vice versa, that would be 322 minus 180 would be 142, I believe; that would be the true

(Testimony of W. N. Beckwith)

course from San Pedro break-water to San Diego and the sea buoy, which is followed by all vessels that are safely navigated. Any course inside of that would be dangerous for the navigation of the vessel. If the vessel went a few degrees inside that course that would take her much closer, and she would fetch up land before she came to San Diego. Point Loma is the most outstanding point there, and the course—that is only about an 80 mile run—all vessels leaving San Pedro make the direct course to San Diego, and that is the course I gave you before. That takes the vessel over 12 miles off Point San Juan and about 14 miles off San Mateo rocks. The coast goes in there a little more and then it works out as it approaches Point Loma. Therefore, navigators are very careful to keep off that course, and they go outside the kelp beds this side of Point Loma, and it's the shorter road. It is known to be a fact among shipmasters, to take a direct line from the San Pedro light-house to the point I described, except in foggy weather they sometimes go a little further off shore for safety. They would not go further in toward land. That would increase their distance, and it would be dangerous for navigation. It would be dangerous because there are the rocks, and you would fetch up the land. They must go on that outside course, in that line. It is most direct.

THE COURT: Q. Now, you speak of boats going from, traveling from San Diego to San Pedro, they first head for the buoy that is about 2 miles off Point Loma?

A Yes, that is the sea buoy.

Q Called the sea buoy?

A Yes.

(Testimony of W. N. Beckwith)

Q And then from that point, what is the direction taken by the boat as it proceeds towards San Pedro?

A 322 degrees, sir, one course direct, about 80 miles.

Q And that course would carry the boat, you say, about 14 miles off of what place?

A That would take the boat about 14 miles off San Mateo rocks.

Q About 14 miles off San Mateo rocks?

A Yes, and about 12 miles off San Juan, 12 and a half miles off San Juan.

Q And are the San Mateo rocks further south than Point San Juan?

A Further east and south.

Q Southeast, and with respect to other portions of the shore, are there places where the boat, the steamer would be less than 12 miles from shore?

A Not until she was very near Point Loma, and also very near San Pedro.

Q In other words, between Point Loma and San Juan point, this course is always at least 12 miles off shore?

A Yes, sir.

Q And from Point San Juan to the San Pedro light-house does the course gradually get closer to the shore?

A Yes, sir, yes, sir; not immediately. San Juan point projects out like a point you see, and then there is a small waver in the shore, a slight bay indentation of the coast line, and then gradually it comes out.

(Testimony of W. N. Beckwith)

THE COURT: Mr. Clerk, will you hand the witness the map?

MR. SCHLEIMER: If I may interrupt the Court, the witness has his own map, and has the diagram that he could easily explain to the Court; the course, he has it all laid out here.

THE COURT: Well, all right; let him use his own map.

MR. SCHLEIMER: Q Is this the same map as is marked "Claimant's exhibit A for identification"?

(Witness examines map.)

A 5102 in the corner, the same thing, yes, sir.

MR. SCHLEIMER: Your Honor, this the same map, the witness states.

THE WITNESS: This is the sea buoy at San Diego. This is kelp in here, and this is Point Loma. This is 322 degrees to San Pedro break-water. That is the break-water lying right close to it. This distance here is twelve and a half miles from Point San Juan to here.

THE COURT: Q That is, to the steamer line?

THE WITNESS: To the steamer line, that is the course line; you see, you asked about the course, and this is a little further out than it is here, but it comes in. It goes further in there and works out here. It would be dangerous—

Q Now, when the steamer is about opposite Balboa, what is the approximate distance off shore?

(Testimony of W. N. Beckwith)

A Balboa? You mean up here; ten and a half miles at Balboa. (Witness measuring on map.)

Q And between Balboa and the break-water there are places where the boat gets even closer to shore than ten and a half miles?

A Well, I will take Long Beach, Seal Beach 7 miles.

MR. CHICHESTER: Q How many?

A 7 miles at Seal Beach.

THE COURT: Had you concluded with the direct examination?

MR. SCHLEIMER: I have a few more questions, your Honor.

THE COURT: Well then, perhaps we had better resume the interrogation after the noon recess. May we inquire how many more witnesses you have?

MR. SCHLEIMER: I intend resting after this witness. I have another witness, but he will be cumulative, and I think we have covered it sufficiently. He is in court.

THE COURT: Does the Government expect to present its case within the period of the afternoon session?

MR. CHICHESTER: Oh, easily, I think, your Honor, unless the cross examination is extremely lengthy. I think we can put our case on in half an hour or 45 minutes at least.

THE COURT: Yes; take a recess at this time.

(Recess at 12:05 P. M. to 2:00 o'clock P. M., same day.)

(Testimony of W. N. Beckwith)

Los Angeles, California, Thursday, May 26, 1932, 2:00 o'clock P. M.

W. N. BECKWITH,

resumes the stand for further direct examination, and having been previously duly sworn, testified as follows:

DIRECT EXAMINATION (Continued)

In answer to MR. SCHLEIMER:

I am also a master and hold a certificate as shipmaster unlimited. I had such a certificate 21 years.

MR. SCHLEIMER: You may cross examine.

MR. CHICHESTER: No cross examination.

MR. SCHLEIMER: That is all, sir.

MR. SCHLEIMER: May it please the Court, I have here Mr. Frank Oreb, who was one of the crew of this vessel in question. His testimony will be to the effect, the same as the first two witnesses as to what transpired at the time the boat was seized; in effect it will be cumulative, corroborating the other witnesses. In the interest of time I believe I can rest now, unless your Honor cares to hear him.

THE COURT: That is the man who was asleep in the bunk when the cutter was seized?

MR. SCHLEIMER: Yes, your Honor.

THE COURT: He is not a seafaring man? Is he a man of any seafaring experience?

MR. SCHLEIMER: He has been in the fishing business for some time. So far as this case is concerned he will practically corroborate the other two witnesses and I thought in the interest of time—perhaps if your Honor cares not to hear from him—I would be willing to rest.

(Testimony of Frederick J. Dwight)

THE COURT: Well, the Court is not suggesting whether any witness should be called.

MR. SCHLEIMER: I understand that, but his testimony will be just what happened after the Coast Guard vessel arrived, so we rest.

MR. CHICHESTER: Are you resting?

MR. SCHLEIMER: Yes.

FREDERICK J. DWIGHT,

called as a witness on behalf of the Government, being first duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

In answer to MR. CHICHESTER:

I am Chief boatswain's mate, United States Coast Guard. I was officer in charge, CG-259 on March 23, 1932. 2 o'clock in the afternoon I was on the course 51 P. S. C. That means compass course from northwest Harbor San Clemente Island.

At 11:15 on the 23rd day of March, I laid my course well clear of northwest Harbor San Clemente Island; the course 68 true or 51 P. S. C. en route, latitude 33 degrees 16 minutes north, longitude 117 degrees 55 minutes west, in search of a reported capsized boat.

THE COURT: One moment. Mr. Reporter, will you read what you have there?

(Answer read.)

THE COURT: What do you mean by "course 68"?

A In laying the course, your Honor, you lay your course on the chart; you move your parallel rules to the center, compass rules, on that compass rule you have a

(Testimony of Frederick J. Dwight)

true course and you have a magnetic course, but before coming to the compass course or P. S. C. you must look up your variation or deviation on the compass.

In answer to MR. CHICHESTER: The reason for having to look up variation or deviation you have local deviation aboard ship that doesn't prove true. All magnetic compasses unless they are corrected very often, which can be done by an expert compass adjuster. In Government service they are corrected every six months. It all depends on how much repair work or shifting of metal or steel or anything that takes place on the vessel during that six months. It amounts to as much as 3 or 4 degrees. If there is anything like steel work or metal work going on around the ship. I laid clear of Northwest Harbor where the X mark is here, I laid my course—Laid my parallel rules, got my latitude and longitude at this point—I then brought my parallel rules to the center of my compass, rules which give me a true course of 68 degrees, noting that the variation is 15 degrees east and 15 minutes with the annual increase of 1 minute. I have been customary here to use 16 degrees variation, so, therefore, subtracting 16 degrees variation from my true course, giving me a magnetic course of 51 magnetic, having 1 degree easily variation which gave me 51 P. S. C. At the time of departing the revolution of my vessel was 700 revolutions per minute on both engines. That was recorded on the dynometer in the engine room. The engineer on watch could see that. I proceeded from the point marked X on the chart at 11:15 in the morning. And I arrived at Point C on the chart at approximately 2:45. I hadn't calculated the distance because I figured the boat was reported here 24 hours later to me and due

(Testimony of Frederick J. Dwight)

to the sea conditions that would work in 5 miles or five and a half miles more to the D position. I made a 5 mile search for the capsized boat. I didn't calculate the distance from X to C. I refer to 11:15 A. M., March 23rd. That was the day on which we overtook the Patricia at point X. At point X, I received radio instructions at 10:45 in the morning from Base 17 to proceed to this position to search for this capsized boat that was reported by the steamer the night before. After I arrived at point C, I continued on in towards the coast. On the same course. The speed of my motors was 700 revolutions. Point D indicates where the Patricia was boarded and seized at 3:15 on the 23rd day of March. In the afternoon. By dead reckoning position from point X; 4 hours run at 10 and a half miles or 10 and a half knots would give me 42 miles from point X to point D. When I arrived at point D, I noticed the American Gas Screw Patricia. That's an oil screw. She was headed to the northwest, and I proceeded to her stern very close, and as I swung to come up to the Patricia starboard side I blew three whistles from my klaxon for the Patricia to stop for inspection, that evidently were not heard, and I then came alongside the Patricia and I motioned to two men in the pilot house and asked them why they didn't stop. The Patricia was well loaded, way in the water. Deep in the water, and I asked one of the men what his cargo was, and he told me he had a cargo of abalones.

I can't recall by name, but one of the witnesses, the short, heavy-set fellow,—Mr. Hirata. Then I placed Blondin aboard. He was seaman first class. He was standing watch with me aboard, placed him aboard the Patricia and Blondin reports to me that they have no

(Testimony of Frederick J. Dwight)

papers and that the *capitan* was left at Turtle Bay. Not satisfied with this information, my boatswain's mate was called, and I myself went aboard the Patricia. I lifted up the main hatch and found out that the main hatch was loaded with sacked liquor. Patrol Boat 259 was approximately 300 or 350 feet to the stern of the Patricia. I motioned to my boatswain's mate to come alongside. I then told this little fellow here—Mr. Hirata to shut off the main engine. This was done, and I searched him and searched the other men and the man known to me as Nick Baritich. He is in the court room. The man with his hand on his mouth.

THE COURT: Well, will Mr. Oreb stand up?

(Man in rear of court room arises.)

THE COURT: Is that the man to whom you refer?

A That's the man, sir.

THE COURT: Very well.

THE WITNESS: He was asleep in his bunk. After searching the three men, I placed them aboard the patrol boat, one man forward, one man amid ships, and one man aft. I then placed the tow line on board the Patricia, about 350 feet of tow line, at which time we brought our starboard wheel—

THE COURT: On the 259?

A Yes, which made it kind of difficult to have headway on the Patricia, and no headway at that time the Patricia overran the tow line, so I ordered my men to cast off the tow line, which they did, and that shifted the tiller which is an emergency for steering aft, and we made a complete circle and came back alongside the Patricia on her port side. I then went aboard the patrol boat and placed Edward Anklo and Kuseno—two of my

(Testimony of Frederick J. Dwight)

men aboard the Patricia. The tow line was again made fast, and we resumed that towing with the emergency rudder or emergency tiller. Then I laid a course from point D to San Pedro break-water. My supposed position at point D. I then laid my course along this line to San Pedro break-water light. (Mark that point Y?) Which was 317 true or 300 per standard compass. For the first two hours I was making various speeds. I can refer to my log on that. From 4 o'clock I made 3.7. That is 3 to 4, I made 3.7; from 4 to 5, I made 2 miles, and from 5 o'clock on until midnight I made 4½ miles per hour. I arrived at the point marked Y at 2400 midnight, March 23rd. Figuring my dead reckoning position, it was just the position from X to D, and from D to Y; I figured that I was 10 miles from San Juan point, 204 degrees true, when I encounted the Patricia. I have a note of that here. I have it made in my report to Washington. This memorandum doesn't give it from San Juan point, but from the San Mateo rock. The nearest point of land is San Juan point. San Mateo rock was ten and a half miles southeast true from San Juan point. This position was by dead reckoning running from San Clemente Island. I mean from the run I had already made from the point at the Patricia to point X. I had no objects due to hazy weather, and visability was very poor. I couldn't see any land marks whatsoever to determine the exact position. That is the reason I took no bearings with reference to land marks, because I could see no land marks to take position from. Seven, which is, objects not visible at 7 miles. I have a record of that in my log. The visibility was 7 at the time I contacted the Patricia at point D. That was about 3:15. We didn't

(Testimony of Frederick J. Dwight)

lose 10 minutes in getting under way, but due to the wheel rope and waste of time, we did not get under way much before 1700, or 5 o'clock. From 3:15 to 5 o'clock I made approximately 10 miles, I believe. I'll withdraw that; I should have said 5 miles. From 3:15 to 5 o'clock I proceeded 5.7. I didn't vary more than 2 degrees from a straight course due to heavy tow. I was able to keep my course within 2 degrees of it. I heard the testimony of the witnesses, Mr. Tomikawa and Mr. Hirata, with reference to my laying a course towards Point San Juan and coming within a distance of 2 miles at that point, and then proceeding towards San Pedro. I did not, no, sir. I have a record in my log of the course I took. My testimony now is based upon the record in the log. That's an official record, of which I have a copy and Washington has a copy, and one copy remains at the Base. Assuming that the point of contract with the Patricia was made as contended for by the claimant at the place on their chart which is marked A, and keeping in mind the course which I laid shown by my record in the log, the Coast Guard boat, together with the Patricia, would have arrived at 12 o'clock midnight of March 23rd clear out here in the center of San Pedro Channel. According to the course that I laid, I arrived at the point toward which I had laid that course. I come into the Base as shown by my log at 0020 or 20 minutes after 12 on March 24th, I moored to Section Base 17. At the time I contacted the Patricia and came alongside, she had absolutely no fishing gear whatsoever. She was down low in the water, I stated. I did not see any liner of the Admiral Line at the time I was proceeding from Point D to Point Y on my chart. I had Seaman First Class Blondin, Boatswain Second

(Testimony of Frederick J. Dwight)

Class Zaitzeff, and I had Motor Mechanic Van Dusen, and I had a ship's cook, (spelling) P-r-e-t-z, I believe it is spelled, and myself. At the time that I boarded the Patricia, I did not make any request or demand of the members on board the vessel for papers or documents. Seaman First Class Blondin did. Such papers were not produced, except two yellow slips which I believe are freight tags which were turned over to the Customs. A tonnage tag. No manifest, no registration or enrollment. The vessel was not flying any flag. She had "Patricia" on her bow, and number 970-A. It had a number, and the word "Patricia". On the stern it had the home port "Los Angeles," but very faint. This line here, X to D, was made at 11:15 on the chart on March 23rd. From D to Y was made at approximately 3:25 on March 23rd, in the afternoon. I layed out these lines on the chart. My boatswain's mate was present. He is Zaitzeff. He is present in court now.

MR. CHICHESTER: You may cross examine.

THE CLERK: Do you wish to number that exhibit? (question addressed by the clerk to the Court.)

THE COURT: Yes, let the record show that the chart which the witness has been examining last, and which contains those lines and letters, will be marked Government exhibit 2.

MR. CHICHESTER: We offer that chart in evidence, your Honor.

THE COURT: So received.

MR. SCHLEIMER: While we are at this point, may I ask that the chart I offered be also considered in evidence. It was marked merely for identification.

(Testimony of Frederick J. Dwight)

THE COURT: Yes, it will be received in evidence as claimant's exhibit A.

MR. CHICHESTER: To which we object on the ground no proper foundation has been laid, as it was shown by the testimony of the witnesses who referred to it that it was made long after the seizure and the happening of the events.

THE COURT: Well, the Court is receiving it merely for the purpose of illustrating the testimony, and for no other purpose.

MR. CHICHESTER: Very well.

CROSS EXAMINATION

In answer to MR. SCHLEIMER: I am not a licensed pilot. I am not a licensed master. In fact, I do not hold any license whatsoever in navigation. It is not required in the Government service. I use a chart of this kind here when working in this locality. At point X I was instructed in a message to proceed to a certain point. That was in the form of a wireless message. That was written up. That message is on file at Section Base 17. I believe there are no copies of that elsewhere. I believe there is record on my boat of that message. In the regular radio blank form that is used by the United States Coast Guard. I received that message at 10:45 in the morning on March 23rd. I proceeded in that direction in half an hour at a speed of 700 revolutions per minute, both engines. It was hazy at that time. It was above the water. So that no kind of objects could be seen in that locality at a greater distance than 7 miles. I could not estimate how high the haze was above the water. When I first observed the Patricia she was

(Testimony of Frederick J. Dwight)

I should judge, a mile and a half. The weather was so clear that I could see a mile and a half from my boat. The haze did not disappear at that time. It was still hazy. The Patricia was I should judge a mile and a half southeast of Point D when I first noticed her. She was coming on this course up the coast, northwest course. From the point Marked E to the point of San Juan, the distance was 10 miles. When I first observed the Patricia she was not about 12 miles from Point San Juan. I know it, because she wasn't coming in; she was off shore. She was coming out from a straight course. I observed that from a mile away, because I crossed her stern. When I got alongside the Patricia I instructed one of my men to go on board. I remained on my boat. He talked to me. I could hear him. I came on board when I was properly relieved. In about 3 minutes. The first man that got on board remained there until I arrived there. I did not speak to Mr. Hirata until after he was aboard the 259, not before. No more than telling him I was going to search him for weapons. I did not hear any of my men talk to him on board the Patricia. Mr. Tomikawa I took it for granted was in the pilot house. He was there when I told him to go out on deck, that I was going to search him. The third man, Frank Oreb was asleep in his bunk. I went into the cabin. I found him in his bunk. I had a man wake him up. When he rolled over, I was standing outside of the pilot house. I was standing outside the pilot house, and one of my men was in the cabin waking him up. One of my men made him get out of the bunk. He was searched on deck by me. Subsequently I ordered the crew of the Patricia to get on board of my boat. I told them they were under arrest.

(Testimony of Frederick J. Dwight)

I placed them under arrest. Then I placed them in different positions on my boat. I then took course 300 P. S. C., or 317 true. You mean because I came across this course and figured out the mileage as it should be here. That's it exactly. That's how I arrived at my position. Did not have on board a sextant. There was one in the cabin, but I can't use a sextant. I am not able to use it That wouldn't determine the exact position of the Patricia at that time. The visibility wouldn't allow it. It wasn't clear at that time. I am sure of that. I did not take any bearings at the point indicated D when I arrived at point D. The indications here of these various lines on that map and the letters that I made is a dead reckoning run which is done when you have no means of aids or sights, or anything, why you just take the speed of your ship. It is not possible that I am mistaken that this vessel was more than 12 miles from this point I have indicated. If I had taken the bearings I would still have my same position from D, as marked on the chart, anyhow if I was able to take bearings. I say that because I have known that ship and worked with it for the last year and a half, and I know when I am running 700 revolutions I am making my speed through the water, and I can rely on the man steering a true course. I have no objection to letting you see my log of March 23, 1932. (Witness hands log to claimant's counsel.) There is a yellow sheet there which is a duplicate copy because the white sheet may not show plain on the back of the yellow one. (Claimant's counsel hands log to the witness.) I had some trouble with the steering at that time, and I used the emergency steering. I used it longer than half an hour. I used it from 3:15 until 5 o'clock. I was steering

(Testimony of Frederick J. Dwight)

from the quadron on the stern. During the time that they were repairing the cable and the steering wheel there were no orders given. There was one man working on the cable and repairing it I was on deck with the man steering, in the stern. This log was in the cabin. Well, I don't know the exact time these men were served with dinner; I imagine around 6 o'clock. I have no notation of that on the log; we don't put miscellaneous stuff in like that. I couldn't tell you at what point we were at 6 o'clock of that day, because it was hazy, and I could see no land marks. The sun was not down at that time. I couldn't say if it was setting at that time; it most likely was, but I couldn't see it due to the haze. In computing the figures I used nautical miles, 6080 feet. It isn't a fact that all the seamen use the geographical miles. My boat arrived at the San Pedro lighthouse at 12 o'clock midnight. My boat arrived at the Coast Guard base at 0020 or 20 minutes after 12 on March 24th. The Coast Guard Base from the lighthouse at San Pedro is about a mile and a half.

MR. SCHLEIMER: No further questions.

REDIRECT EXAMINATION

In answer to MR. CHICHESTER:

The use of dead reckoning in figuring and laying a course has been used for the past 7 years on Coast Guard patrol boats on the east coast and the Pacific coast. That manner of laying a course to ascertain my position on the water and the point at which I intend to arrive, as a rule, has been accurate during that period of time. I find it has been accurate. Well, I have to consider it, dead reck-

oning, due to foggy weather and so forth; it is used generally. They have no sextants. They rely on dead reckoning for traveling around the ocean at night and in the day-time. There has been no instance that I know of whatever here during the time I have been stationed at this point wherein they have piled up on the rocks or the shore of the coast. Well, from the general appearance of the boat and type of boat, she is a known fishing purse-seiner, known in these waters. There were no nets whatsoever on the boat. I have seen a purse seine; they vary. If the net was on the boat it would be possible for me coming alongside to see it.

RECROSS EXAMINATION

In answer to Mr. SCHLEIMER: Well, 75 feet has only a draw of about 3 feet of water, so the current that runs in this locality here doesn't interfere with it. You can take a sounding with a deep sea lead, is one way of determining your position, but at the spot where the Patricia was sighted there was 338 fathom of water, and we have no lead on board a 75 footer that will reach the bottom at that depth. It is not a fact that the only way to determine the true position of a boat on the water is by the use of a sextant or by taking her bearings. The dead reckoning will bring you within a mile of your position.

Q It is not the accurate way of determining the distance. Isn't that true?

A I have answered the question. It will bring you within a mile of your position.

MR. SCHLEIMER: That's all, sir.

MR. CHICHESTER: That is all.

(Testimony of Everett Blondin)

EVERETT BLONDIN,

called as a witness on behalf of the Government, being first duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

In answer to MR. CHICHESTER: I am a seaman first class, United States Coast Guard. For about a year and 8 months in the Coast Guard. I was so employed on March 23, 1932. I was on board CG-259 at that time. I heard the testimony of Mr. Dwight that has just been given. At the time I came alongside the Patricia in the afternoon of March 23, 1932, I noticed she was very heavily in the water with all them oil drums on her stern. There was one man in the pilot house was all I could see at the time. Did not see any nets on the vessel; no fishing gear of any kind. I went in and inquired for the master of the boat— This little short man (indicating). Mr. Hirata. He said the master of the boat was left in Turtle Bay, that they were tenders for Turtle Bay Canneries. I asked for a manifest and registration papers, and he said he didn't have any. Mr. Tomikawa, the small Japanese was at the wheel. Frank Oreb was asleep in the bunk. He gave his name as Nick Baritch at the time. I argued with this fellow over his papers and I could smell whisky then, so I was watching for Mr. Dwight to come alongside; I knew he would be there any minute as soon as he called a boatswain's mate to relieve him, so I walked out to the back of the cabin where Hirata— I walked back with him, and by that time Dwight came aboard, and as soon as he came aboard he lifted up the hold and discovered whisky. I am not a navigator.

(Testimony of Everett Blondin)

I was back in the stern. I was watching the tow line and guarding one prisoner. I had binacles practically all of the time. I was searching for a small boat. The visibility was very low. In my opinion the visibility was about 7 or 8 miles, no further than that. I was searching the horizon for this capsized boat Mr. Dwight referred to. I did not see that boat. I did not see any Admiral Line steamer any time from the spot where the Patricia was brought in until I arrived at San Pedro light. I was using the binacles most of this time.

MR. CHICHESTER: That's all. Cross examine.

CROSS EXAMINATION

In answer to MR. SCHLEIMER: I was on watch from 12 to 4. After 4 we were pretty busy, and I was around the deck all the time. I didn't see any steamer. There was no steamer named "Watson" that passed there. I am sure. I didn't know of any steamers around there going or coming. I didn't see any. On the evening of March 22, 1932, I was on board 259. Out in the ocean. I did not see this steamer on March 22, 1932, going to San Pedro. I did not see the steamer at San Pedro or Wilmington at any time. I do not know the course the steamers take when they leave San Pedro lighthouse for San Diego. I do not know that. In the morning about 7 o'clock on March 23, 1932. we were over in San Clemente Island some place; I was asleep at that time. Patrolling. I was asleep at that time. I do not know if weather was clear at that time. I was asleep. Before I went to sleep it was not. It was very hazy. I do not know anything about navigation at all. I do not know very much about the speed of a boat. I would recog-

(Testimony of John D. Zaitzeff)

nize point San Juan from my boat if I was close enough about 7 o'clock, or say about half past 6 on March 23, 1932. I was down below in the cabin at that time.

MR. SCHLEIMER: That is all.

MR. CHICHESTER: That is all.

JOHN D. ZAITZEFF,

called as a witness on behalf of the Government, being first duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

In answer to MR. CHICHESTER: I am a Seaman United States Coast Guard; for about 6 years. I was so employed on March 23, 1932. I have heard the testimony of Mr. Dwight and Mr. Blondin. At the time that the Coast Guard 259 approached the Patricia, I was asleep on the 259. At about a little after 3 I was called to relieve the skipper, so he could go aboard the Patricia. I was on the 259 at 11:15 A. M., of March 23rd. I had the watch that morning. I was present when the chart which is Government exhibit 2 was used to lay out a course from Point X to Point C. After receiving a message to proceed to—I can't remember the exact latitude and longitude—we got under way. We were outside of Northwest Harbor about a mile and a half off—At Point X, approximately. Yes, and we estimated the course as 68 true and 51 P. S. C., or Per Standard Compass. Mr. Dwight and I were both in the pilot house then, and we proceeded 700 turns which gave us about ten and a half miles per hour, and after about 2:15 I turned in. I was asleep about half an hour, and was called about 3:15 to relieve my officer in charge. I was present at the

(Testimony of John D. Zaitzeff)

time Mr. Dwight laid the course. That was shortly, about 4 o'clock, or something like that. I can't remember the time. On March 23rd. The officer in charge laid it, and I had to check it over. I was on watch at that time. He had the boat then and I had to work around with the line. He laid the course and then proceeded on at that time. I stated I was on watch about 3:15 in the afternoon on March 23rd until I arrived at San Pedro light. I was up during that period of time. During that period I did not see any Admiral Line vessel. I had occasion to look around the horizon while we were proceeding. The visibility was about 7 miles. It was hazy.

Q When you were at the point where the Patricia was sighted, were you able to see any landmarks that you could recognize for any distance?

A Well, from the position where we were in a northeast direction at that time it seemed a little ways to a high mountain, but that could not be recognizable.

Q That's the only thing that could be seen?

A Yes.

Q Could you see any part of Catalina Island?

A Not at all, sir.

Q You could not?

A Not at all.

Q Was anything said to you by either Mr. Tomikawa or Mr. Hirata, or Mr. Oreb during that trip?

A No, they asked me—they admitted to me that they didn't know where they were at. They asked me if I could tell them.

Q They did.

A Yes.

The Court: Who asked you that?

(Testimony of John D. Zaitzeff)

A That gentleman over there.

MR CHICHESTER: Mr. Hirata, the man in the dark suit?

A No, in the gray suit.

Q Mr. Tomikawa?

A Yes.

Q They said they didn't know where they were?

A Yes, sir.

MR CHICHESTER: Cross examine.

CROSS EXAMINATION

In answer to MR SCHLEIMER: I say I could see the top of mountains in a northeast direction. That is on the map there. I saw the mountains. Santiago Peak. It might be here, and it might be there. I am familiar with that peak. I could not see any other mountains. I could not see the top of Catalina Island. All I saw was for about 5 minutes, and then gone. Saw it about 5 minutes. That was about 4 or 4:15. It was just about the time we started to tow the Patricia. The highest mountain you could see. It could not be very long, and then it disappeared; from then on it was hard to see. I was looking in that direction towards Santiago Peak. I say I am familiar with it; it is in that direction. I was looking in that direction. I have been on this coast for several years. I have seen Santiago Peak in clear weather a good many times.

THE COURT: Well, you are able to navigate a boat?

A Yes, sir.

Q And determine the location of your boat?

A Yes, sir.

(Testimony of John D. Zaitzeff)

THE COURT: You may proceed.

In answer to MR SCHLEIMER: I am quite familiar with that direction I have indicated on the map as Santiago Peak. On March 23, 1932, when I saw the highest point in that direction. I couldn't rely on it. It is not recognizable; it might be Santiago Peak or something else. If there is any other mountain that direction it would show on the chart. I never saw any other mountain in the direction where Santiago Peak is as high as that. I did not see any other land besides that. I did not see any other land off in the direction where San Juan point is. I say all that you could see was about 7 miles distant from the boat. That's right. I heard the previous witness testify that it was about, a little over or in the neighborhood of 10 miles off San Juan Point. We started to proceed towing the boat. We went to Pedro. Before we went to Pedro, we didn't go a little distance nearer to the shore. We turned right to San Pedro. I was not in charge of steering the boat at that time. I was repairing the ropes at that time. We didn't have enough men. So I was left repairing the wheel ropes while the commanding officer had the wheel. I cannot say at what time did I commence to repair the wheel ropes. About 5 o'clock they were fixed. I commenced it, as soon as we started to tow the Patricia. We started to tow the Patricia I would say about 4, somewhere around 4 o'clock. From 4 o'clock, when we commenced to tow the Patricia, to about 5 o'clock I was busy repairing the ropes. I was watching for steamers passing by there while I was repairing. There was somebody else besides me on watch while I was repairing the ropes. I have no license as a master, or as a pilot. They don't require it in the Government

(Testimony of W. N. Beckwith)

service. I have no master's license. We took bearings on March 23, 1932, about 11:10. At Northwest Harbor, San Clemente Island. The weather was not clear then. We took the last bearing just before we entered San Pedro Channel, shortly before midnight. We were pretty close then; we were right at Pedro lighthouse at 12 o'clock.

MR. SCHLEIMER: That is all, your Honor.

MR. CHICHESTER: That is all, your Honor. The Government rests, your Honor.

W. N. BECKWITH,

recalled as a witness on behalf of the Claimant, having been previously duly sworn, was thereupon called in rebuttal, and testified as follows:

In answer to MR. SCHLEIMER: I was present here when the first witness on behalf of the Government pointed out the various points on the map. I recall where the first Government witness indicated point X on the chart. I examined that chart and made measurements while he was testifying. As a result thereof, I found from point X, from the point of departure, to this point, I found 36 miles distance. From point C to point D, as indicated on that chart, I found about 6 miles. From point D to the shore, about ten and a half miles. I heard his testimony in which he explained that he arrived at a true course in the measurements here. That is the proper way to measure to arrive at the course. By dead reckoning. That is not accurate. Ocean Currents, slip of wheel, winds, tides, and also you are not sure of the speed of your vessel. In case of haze where you can't see, regardless of the horizon, with a sextant aided by

artificial horizon. If you can't see some celestial body, such as the sun or a star. There is an other way to determine the position of the vessel in such weather. They try soundings, but they are not accurate. There are a good many alike on this part of the coast, that are the same. The soundings here in a 30 fathom curve go in for 3 or 4 miles from the shore and then extend out 10 or 12 miles off shore in the vicinity. It goes 10 or 12 miles off shore so therefore it is not accurate. When you are running on soundings you must either have your latitude or longitude to proceed on, and then you can proceed along and pick up soundings as you go and refer to them. That's a fair guide, but not accurate; otherwise land bearings are the best guide. Land bearings are the best guide when available; soundings are not, and dead reckoning is very poor. There are considerable currents between San Pedro and San Diego. The ocean currents are variant as far north as Cape Loma and Cape Flattery. Winds affect that and tidal waves, and so forth. I have come from Catalina Island sailing yachts, power yachts, a distance of 22 miles, in a current, and I have allowed as much as 5 miles for drift of current in a distance of 22 miles.

MR. SCHLEIMER: That is all. You may cross examine.

CROSS EXAMINATION

In answer to MR. CHICHESTER: I am a captain; master. I have been master of large liners or vessels. The speed of those large vessels is determined by observation of land and by bearings. The same as the small boat people do, by sextant angles, latitude and longitude,

(Testimony of W. N. Beckwith)

and at night by the use of celestial bodies. The log is not regarded as much now. In a large vessel now, you put the log out 12 to 14 hours after leaving port, and then you take it on board until you are within 24 hours of the destination. Usually they put it out 24 hours before reaching the destination to assist them in case of foggy weather or something of that kind. I operated in sailing schooners, yachts, motor yachts, and ocean steamers, and small steamers. I never operated a speed boat from San Diego to San Pedro. I have steered speed boats and run over to the Island with them. I never had control of a speed boat, the motors, the wheel, and running of a speed boat as a master would on larger boats. My experience has been confined to all types of vessels with the exception of speed boats. It is a fact that speed boats don't draw much water. A vessel that doesn't draw much water would sometimes be affected more by the weather than a vessel that does draw it. Well, the winds—there is a chance for difference of opinion. There are certain currents, some deep currents, some currents at 30 feet, and sometimes as adverse as at 3 feet. I never operated a speed boat at all. I don't know how much a speed boat may drift in a current or wind from actual experience. I can't say that I ever saw a speed boat drift from current or winds. I don't know how much they would drift over a course of 25 or 50 miles. The wind would give it more drift. I know how to refer to dead reckoning generally as to accuracy.

MR. CHICHESTER: That is all.

MR. SCHLEIMER: We rest again.

MR. CHICHESTER: At this time, your Honor, we move to amend the libel and include another count under Section 46, U. S. C. A., 60, which is Revised Statutes 4189, and the violation will allege that the vessel was using a record or document in lieu thereof when she was not entitled to the benefit thereof and that the use was fraudulently made.

MR. SCHLEIMER: We object to any amendment at this stage of the proceedings. We haven't appeared generally. We have appeared specially, and I respectfully submit at this time that the Government should not be permitted to amend. We have rested on the evidence. If they desire to amend they probably will have an opportunity to allege that point when the main issue would come before your Honor, if it does come before your Honor.

THE COURT: Well, we see no occasion to go into the question of any additional alleged violations until we come to consider whether or not the Court may try the case upon its merits. At that time counsel may renew any application to amend in accordance with the theory just announced.

THE COURT: Well then, I think we will make an order continuing these proceedings until June 6th, that counsel for the claimant will file his memorandum of points and authorities on or before June 2nd, that is next Thursday.

MR. SCHLEIMER: That's all right.

THE COURT: June 2nd, and Government counsel then will advise the Court by June 6th whether or not there will be any additional or reply memorandum filed?

MR. CHICHESTER: Yes, your Honor.

(Whereupon an adjournment was taken.)

Los Angeles, California, Monday, June 13, 1932, 10 o'clock A. M.

MR. SCHLEIMER: This is an application made by the Objector to defer the decision on the matter that was taken under advisement and for permission to reopen that matter and for leave to file the affidavits attached to the motion papers, and if the attorney for the Government desires to cross examine the affiants upon that particular question, that we be permitted to call these witnesses for that purpose. Mr. Schleimer read the notice of motion dated June 10, 1932 and the affidavit of Toichi Tomikawa sworn to June 9, 1932 and the affidavit of Max Schleimer sworn to June 10, 1932 upon which said motion was predicated. (Argument.)

MR. PARKER: (Argument.) Now counsel comes in with a motion to reopen the case in order to submit additional evidence. If the motion which is presented here in affidavit form is presented solely on the question of the jurisdiction or the objection to the jurisdiction, we have no objection to that matter being submitted in affidavit form, but we wish it understood that in stating we have no objection we do not agree to the submission of that evidence on the decision of the issues of the case on the merits, because we do not have an opportunity of

cross examining these witnesses whose testimony is presented by affidavit form, and if the matter goes further we desire that. Therefore I request that this matter be considered as before the Court at this time solely on the question of jurisdiction, and if the Court decides there is jurisdiction in the court to consider this libel, I then request that the matter be brought on for further disposition. We have practically put in all the evidence we desire to put in on this matter with the exception that by these affidavits there may be other matters put in which we may desire to answer. I want to call the Court's attention to Section 615 of the Tariff Act, which throws the burden of proof on the claimant. This places the burden on him and the right of the Government to answer. I want to add this, that we make no objection to those affidavits because we consider them absolutely immaterial to the matter of jurisdiction.

(Argument by Mr. Parker, citing authorities).

THE COURT: In other words, the position of the Government counsel is that these objections that are here sought to be raised do not go to the question of the jurisdiction of the Court to proceed, but rather may be raised possibly when we come to consider the case upon its merits?

MR. PARKER: Exactly so.

(Argument by Mr. Parker).

MR SCHLEIMER: (Argument).

THE COURT: May we interrupt here: We understand that Government counsel has no objection to reopening the cause for the purpose of filing these affidavits, the same to be considered solely on the objection to the jurisdiction and for no other purpose?

MR. PARKER: That is correct your Honor.

THE COURT: Very well, then, an order will be entered reopening the cause for the purpose of submitting the affidavits presented. The affidavits will be ordered filed and considered solely in connection with the objection to the jurisdiction. That leaves the matter now in the position in which we were at the previous hearing except that we now have these additional affidavits.

(Argument.)

Mr. Schleimer then read into evidence the affidavit of William Lambie, which is as follows:

State of California)
) SS
County of Los Angeles)

I, William Lambie, being first duly sworn, depose and say that I am a Naval Architect, and have conducted my business for the past ten years, at Security First National Bank Building, Wilmington, Calif.

That I did on the 8th. day of June 1932, at the request of Mr. Max Schleimer, made certain calculations in order to determine the speed of the Japanese Vessel "Patricia", whose dimensions are as follows:

Length.	82 feet.
Breadth	18.5 feet
Draft Loaded	8.75 feet
Brake Horse Power .	100.

The above mentioned calculations results of which are shown on the accompanying chart indicate that the maximum speed obtainable with 100 Brake Horse Power is 7.9 nautical miles per hour.

William Lambie

Subscribed and Sworn to before me, this 8th day of June 1932.

[Seal] Don C Pohl

Notary Public in and for the County of Los Angeles, State of Calif.

Mr. Schleimer then read in evidence the affidavit of P. B. Young, which is as follows:

COUNTY OF LOS ANGELES)
) SS.
STATE OF CALIFORNIA)

This is to certify that I, P. B. Young, Surveyor to the Board of Marine Underwriters of San Francisco, being duly sworn, deposes and says, that I did at the request of Mr. Max Schleimer, calculate the speed of the Fish Boat "PATRICIA" vessel having the following particulars:

Registered Length	82′
Breadth	18.5′
Draft Loaded	8.75′
Horsepower	100

From my calculations, the maximum speed of the Fish Boat "PATRICIA" in a loaded condition is 7.6 knots per hour.

P. B. Young
P. B. Young, Surveyor
BOARD OF MARINE UNDERWRITERS
OF SAN FRANCISCO

Subscribed and Sworn to before me, this 8th day of June 1932.

[Seal] Don C. Pohl
Notary Public in and for the County of Los Angeles, State of Calif.

THE COURT: The matter will stand submitted.

(Whereupon, the hearing in the above entitled matter was adjourned.)

At a stated term, to wit: September Term, A. D. 1932, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 13th day of October in the year of our Lord one thousand nine hundred and thirty-two.

Present:

The Honorable Harry A. Hollzer, District Judge.

The objection to the jurisdiction of the Court, also the motion to quash seizure and to dismiss the within proceeding and the petition to quash the seizure and all proceedings based thereon, are and each of them is denied.

An exception is allowed to the Claimant.

LOS ANGELES, CALIFORNIA,
MONDAY, OCTOBER 31, 1932, 10 o'clock A. M.

(Argument.)

MR. SCHLEIMER: To the effect that the steamer was about 13 or 14 miles—I have forgotten which—I think about 14 miles from the coast, and this particular boat was about 3 miles from her. That would show that she was outside of the jurisdiction of the Court.

THE COURT: Well, may we say that from our examination of the record, we are convinced that the defendant owner of the boat didn't know where his boat was; that his testimony in that regard is of very little value, in contrast to the testimony of the officers of the Coast Guard, whose business it is to know where their boats are, and whose testimony impressed us as being both reasonable and in accordance with the facts. It is our thought that this case might very well be presented, as counsel have indicated they intend to present it, upon the evidence taken. We believe that ultimately the termination of this case involves a question of law, rather than of fact. And, as far as the facts are concerned, we see no occasion for any other conclusion than that the boat was within the legal limits of seizure. We should probably have time next week for the hearing of any arguments.

MR. CHICHESTER: My only difficulty in that regard, your Honor, is that unless it be on Monday, I am engaged in trial for the next three weeks every day in court. Unless November 21st, that's a Monday, would be open at that time, if it is available to your Honor, or any week day thereafter.

THE COURT: Well, then, we will set the matter for November 21st, at 2 o'clock P. M.

MR. SCHLEIMER: Thank you, your Honor.

Los Angeles, California, Monday, December 5, 1932.

THE COURT: Are you ready in this matter, Gentlemen?

MR. CHICHESTER: We are ready for the Government.

(Argument.)

MR. SCHLEIMER: May it please the Court, at this time claimant and respondent move to dismiss the libel of information, upon the following grounds: First ground is that the libel in Count 1 is for alleged violation of an alleged license, and it is not alleged in the libel of information that a license was issued, and the nature of that license. Paragraph 1 alleges the seizure; paragraph 2 alleges the appraisal; and paragraph 3 alleges that there was awarded by the Collector of Customs a number of the vessel "Patricia"; it doesn't allege whether that is a license or what the fact is regarding the number; as a matter of fact, the number is not a license; it is not a registration or an enrollment; therefore, the count upon its face does not allege facts sufficient to constitute a cause of action. Count 2 has improperly combined three different and independent alleged causes of action in the one count. Paragraph 1 simply repeats certain other paragraphs of Count 1; paragraph 2 alleges the seizure of the cargo, paragraph 3 the date of seizure, and that the Master has failed and refused to produce a manifest; paragraph 4 alleged two offenses—one, the penalty of

$500.00, and the other a penalty; paragraph 5 set forth another penalty under a different section. As I understand the rule, each violation or alleged violation of the statute is an independent cause of action and cannot be united with other counts—or other offenses in one count.

MR. SCHLEIMER: I also move to dismiss the libel of information, upon the ground that it does not allege that this Honorable Court had jurisdiction over the vessel "Patricia" on the date of the filing of the libel of information, and, therefore, the libel and information is insufficient upon the face thereof. This Honorable Court has no jurisdiction of this action, for the following reasons: that the libel and information must allege that this Honorable Court had or has jurisdiction of the vessel "Patricia"; that the libel and information alleges that the vessel "Patricia" was in custody of the United States Coast Guard, Section Base 17, in the Harbor of Los Angeles, which is but another way of alleging that the said vessel was then under arrest, and it is not alleged that she was lawfully arrested; that it appears on the face of the libel and information that the agents of the United States Coast Guard, Section Base 17, seized the vessel "Patricia", March 23, 1932, but it doesn't allege the place where she was seized; so as to show that the seizure was made within the territorial limits of the United States and was within the limits of the jurisdiction of this Honorable Court.

MR. SCHLEIMER: (Argument and citing cases.)

THE COURT: It seems to us we have gone over these matters and are now re-tracing our steps. In the ruling heretofore made, the court decided in its order the objection to the jurisdiction of the court, also the

motion to quash the seizure and to dismiss the proceeding, the petition to quash and all proceedings based thereon, and each of them is denied; we find nothing new in the argument which is advanced here, unless there is something further to be said by Government counsel.

MR. CHICHESTER: We have nothing to add to the authorities cited; we assume, however, that they have all been gone into by Your Honor; in view of Your Honor's ruling, we see no reason for adding anything to what has been said; I have heard nothing new by way of authorities.

MR. SCHLEIMER: May it please the Court, perhaps I didn't make myself clear. The objection raised to the jurisdiction was by special appearance for the purpose of quashing the proceeding,—I mean the seizure; the objection now goes to the sufficiency of the libelant's information.

THE COURT: Yes, we understand; but the argument which has been advanced today is, in substance—though it seeks to travel along a different route, nevertheless it is an argument which presents the same law; we believe we have gone into that matter.

MR. SCHLEIMER: But, may it please the Court, if it is necessary to allege the place where the seizure is made, and that isn't alleged in the complaint, and if it be true that the jurisdiction of this Honorable Court must appear upon the face of the libel - -

THE COURT: Your contention is that the libelant should have stated what the truth disclosed, that the seizure was within the territorial limits of the United States, and particularly of the Southern District of Cal-

ifornia? That, in substance, is the meat of your contention,—is that correct?

MR. SCHLEIMER: May I respectfully state this,—that is not the way I would put it; my contention is that the complaint, the libel information, does not state where the seizure was made by the Coast Guard authorities; and I will say that the contention of the Government was, at the prior hearing, on the application to quash; that it was within the twelve mile limit; but there is something else to be said about that which I will say later; but I cannot raise that on this motion.

THE COURT: Now, may I ask Government counsel, is it desired to amend the libel so as to recite what the proof discloses, that this vessel was seized within the jurisdiction of this court?

MR. CHICHESTER: I hardly see the necessity, because we have alleged that the vessel at the time of the violation of the libel was within the jurisdiction of the court; in the case of Ford vs. United States, that was sufficient in respect to jurisdiction.

THE COURT: We are only concerned here with the libel, and if at the time the libel was filed the vessel was within the jurisdiction of this court, the other matters had to do with the right of the Government to take the vessel, in the first place, and seize it; we have gone into that and ruled upon it. The motion to dismiss is denied, and you may have an exception.

MR. SCHLEIMER: May the record show that I have an exception to each and all of the grounds made by me?

THE COURT: Yes.

MR. SCHLEIMER: And at this time, may it please the Court, that at this time it is stipulated between the libelant and claimant and respondent, that the testimony of the witnesses and the evidence taken on behalf of the *libeler* on the hearing of the application made by claimant to quash the seizure, and to quash all proceedings had thereon, be deemed as taken on behalf of the libelant in support of the libel and information, with the same force and effect as if the witnesses were now here and sworn and had testified in open court on the trial hereof?

MR. CHICHESTER: We so stipulate.

MR. SCHLEIMER: It is also stipulated between the libelant and claimant respondent that the testimony and evidence taken on behalf of the claimant respondent on the hearings, on his application made to quash the seizure and set aside all proceedings had thereon, together with the affidavits filed by claimant and respondent on his application, and the affidavits and exhibits filed by the claimant and respondent on his application to reopen that proceeding—that is, the proceeding to quash, be deemed as testimony and evidence taken on behalf of the claimant respondent in support of his answer filed in this case, and in opposition to the libel of information, with the same force and effect as if the witnesses and the affiants were sworn and testified now in open court at the trial of this case, and that the objections and exceptions, if any, taken by claimant respondent be deemed as taken on this trial; might I amplify that by submitting this statement: I do not recall off-hand any objections or exceptions taken; but my purpose of putting this into the stipulation was that Your Honor was good enough to grant us an exception to your ruling on the

motion denying the application to quash; and we wish to preserve that exception.

MR. CHICHESTER: We do not care to stipulate as to the affidavits to which counsel refers; we will include in the stipulation that if the witnesses whose affidavits are referred to in the stipulation were called, they would testify in accordance with the statements contained in the affidavits, but not as to the truth.

THE COURT: That is what we understand the stipulation is intended to cover.

MR. SCHLEIMER: That is all its amounts to.

THE COURT: Then we understand the Government wants to amend that libel?

MR. CHICHESTER: Yes.

THE COURT: The amendment is granted.

MR. SCHLEIMER: I wish counsel would answer my request, whether he will so stipulate.

MR. CHICHESTER: We so stipulate, with the modification.

THE COURT: We understand Government counsel joins in the stipulation, with the modification heretofore noted, about the recitals in the affidavits; the truth of these recitals is not admitted, but it is stipulated that we have as testimony in the case the recitals contained in these affidavits.

MR. CHICHESTER: That is correct. What about our motion to conform as to the proof?

THE COURT: Yes; the Court has granted leave to amend.

MR. SCHLEIMER: May I respectfully ask the court at this time that the court grant permission to amend our answer, or that our answer be deemed amended, so as

to take in the proof with regard to which the motion was granted,—in other words, conform with the proof is but another way of amending a complaint; and unless we make request for permission to answer that particular portion—

THE COURT: The court allowed the amendment, with the condition that that shall be deemed denied.

MR. SCHLEIMER: It is agreeable to us.

MR. CHICHESTER: If Your Honor please, in support of the Government's position, we have a few authorities which we will cite, without alluding to them at length.

MR. SCHLEIMER: May I interrupt, Mr. Chichester? May I suggest this,—that I should be permitted to take the initiative on the motion; in other words, that if you permit me to make the statement, if there is anything new, then you can answer? I think that would save a great deal of time; of course, I expect to take quite a bit of time, not unnecessarily, in going into the merits.

THE COURT: We have this suggestion to make to counsel: Counsel appreciates the restrictions upon our time—to the extent that the points and authorities be presented by respective counsel are to assist us, and we find it advantageous to have the same presented in written form, preliminarily, so as to enable the court to examine the same, and thereby direct the oral argument in those channels which will be of help to us in reaching a decision; we find more or less handicap in listening to oral argument respecting which we have not been preliminarily apprised of the respective contentions of counsel; hence, we prefer that this be in the form of written memoranda, with additional points and authorities to

which our attention shall be directed; we will undertake to study the same, and if, after examination of same, we find that oral argument would be helpful, we will indicate in what respect such oral argument is needed; in event we conclude, after studying the authorities, we are prepared to decide the case without oral argument, we will act accordingly.

MR. SCHLEIMER: Then I ask permission at this time that I be permitted to make my motion as though this were the close of the entire case; if it please the court,—

THE COURT: Suppose you state your motion.

MR. SCHLEIMER: I want to state my motion as briefly as I can without argument, and state this motion as though it were made at the close of the entire case, because it is the close of the case: Claimant and respondent, may it please the Court, is moving at this time for judgment in his favor, upon the following grounds: That the undisputed evidence is to the effect that the claimant and respondent was at the time of the seizure, and prior thereto, a Japanese, a citizen of the Empire of Japan; that he, at the time of the seizure, and prior thereto, was and still is the sole and exclusive owner of the vessel "Patricia", the vessel seized in this proceeding; that by reason of his citizenship, the vessel "Patricia" is deemed as a foreign vessel, and for that reason the agents of the United States Coast Guard had no jurisdiction or authority to go on board that vessel and seize her at the point and place where she was seized on the high seas; second—my second ground of the motion: That the Collector of Customs had no authority—no power, authority or jurisdiction to number the vessel

"Patricia" as an undocumented vessel of the United States, for the following reasons: that he knew the applicant, the claimant and respondent in the case, was not a citizen of the United States, but a Japanese and a citizen of the Empire of Japan; that the provisions which permit the numbering of an undocumented vessel apply exclusively to vessels owned exclusively by citizens of the United States, and not by foreign citizens who happen to be in the United States; that Sec. 288, Chap. 12, title 46, of the U. S. C. A., and Section 45 of Chapter 2, title 46, U. S. C. A., under which the Collector of Customs attempted to number the vessel, must be read together with Sections 11, 58, 60, 61, of Chapter 2, title 46, U. S. C. A., and Sections 251 and 252, Chapter 12, title 46, of U. S. C. A; and when so read it will appear that the Collector of Customs did not have power, authority or jurisdiction to number the vessel as an undocumented vessel; that the act of the Collector of Customs in numbering the vessel "Patricia" is null and void and of no legal force and effect; that the vessel "Patricia" must, for these reasons, be deemed a vessel as though she was never numbered by the Collector of Customs.

My third ground of the motion is as follows: That the vessel "Patricia" must be judged by her nationality, and that her nationality is deemed to be the nationality of the owner; and her owner being a Japanese and a citizen of the Empire of Japan, the vessel "Patricia" is likewise deemed a Japanese vessel belonging to the Empire of Japan.

My fourth ground of the motion is as follows: That the vessel "Patricia" must be judged as a vessel of the Empire of Japan, then the evidence on behalf of the

libelant is insufficient in law to grant the prayer of the libel and information, for the following reasons: There was no evidence introduced by the libelant that she was in contact with any other vessel or boat on the high seas at the point or place where she was seized; that there was no evidence introduced by the libelant of her speed, or that the vessel "Patricia" could traverse in one hour from the point where seized on the high seas to the nearest point to land of the territory of the United States, as provided for in Article 2, Section 3 of the Convention between the United States and Japan, proclaimed January 16, 1930, U. S. Rev. Stat. 46, pages 2446 to 2448.

My fifth ground of the motion is that the undisputed and uncontradicted testimony of the witnesses for the claimant and respondent is as follows: That her maximum speed, when laden, is 7.6 nautical miles per hour, or 7.9 nautical miles per hour; that between March 15, 1929, and March 15, 1932, while on the high seas, the vessel "Patricia" could not make a speed of more than 7 knots per hour; that by reason of that, the vessel "Patricia" could not have traversed in one hour from the point or place where she was seized on the high seas, to the nearest point to land of the territory of the United States, provided for in the Convention between the United States and the Empire of Japan, proclaimed on January 16, 1930.

MR. CHICHESTER: May I have that citation?

MR. SCHLEIMER: U. S. Statutes, 46, pages 2446 to *2448*.—

Now, my sixth ground of the motion is as follows: That if this Honorable Court's decision on the motion—on the application to quash be regarded as a decision, that

the Convention referred to by me does not apply to the vessel "Patricia", and that that would be tantamount to a decision of failing to give effect to the provision of that Convention; by Article 6 it was expressly agreed by the high contracting parties, that they shall each enjoy all the rights they possessed prior thereto, which I take it means that the territorial limits of the United States was to be regarded as three miles off shore, and, therefore, upon the libelant's own showing, the seizure made was outside that limit, and was therefore unlawful.

My seventh ground of the motion is—

THE COURT: How many grounds have you, there?

MR. SCHLEIMER: I have two more, Your Honor, but I will be very brief: that the undisputed and uncontradicted evidence on the part of claimant and respondent shows that the master of the vessel Patricia came to the point where she was seized, in order to ascertain his position, to get his bearings, and intended to return to the place where he had been, which was very far out at sea, on the high seas, and that when he came into the place where he was seized, for the purpose mentioned, that the Coast Guard authorities had no jurisdiction to seize the vessel, because it had a right under the statute to come in for that purpose, and he wasn't violating any law.

My eighth ground of the motion is: That the vessel Patricia was seized on the high seas, in violation of the Statutes of the United States; and my ninth ground of the motion is that the vessel Patricia was seized on the high seas, in violation of the Convention between the United States and Japan, to which I have already called the Honorable Court's attention. There is one particular

point that I would like to very briefly call to the attention of the court.

THE COURT: May we repeat that the value of your argument will be enhanced after the written memoranda have been filed? We are going to suggest that a time be fixed for the serving and filing of these memoranda.

MR. SCHLEIMER: If the Court please, I am at present working on two very urgent briefs, and there is awaiting me a reply brief that I have to file in the State Supreme Court, involving very important questions, and, as long as Your Honor is going to take this under advisement—

THE COURT: We do not want to keep it under advisement to such a length of time that we will have forgotten the evidence and will have to read the transcript over; our thought is that while the points are comparatively fresh in our minds, that we proceed to present the written arguments; let us set down a reasonably early date for such oral arguments as may be necessary; how long will it take? In the first place, the Government, of course, is the moving party, so far as seeking forfeiture under this libel is concerned; how long will it take Government counsel to file his brief?

MR. CHICHESTER: If Your Honor please, I will be in court all the balance of this week, and if I may have a week from next Friday, I am sure I can get in all our authorities by that time.

THE COURT: May we suggest that Government memoranda be filed within two weeks from this date, and that claimant, respondent have two weeks thereafter to reply; and if the Government desires to add anything further, that that be done within five days thereafter,

and we will set this matter down for oral argument on the last Monday in January; what date will that be?

THE CLERK: The 30th of January.

THE COURT: January 30th, at 2 P. M.

MR. SCHLEIMER: May I, before I leave, make this statement: All the grounds of my motion resolve themselves in one question, and that is on the testimony; that is undisputed; that is, whether the claimant was a Japanese citizen; that is the entire proposition on the question of law; however, the Government has two weeks to file its brief, and we will have two weeks thereafter?

THE COURT: Yes.

LOS ANGELES, CALIFORNIA,
MONDAY, FEBRUARY 27, 1933.
2:00 o'clock P. M.

THE CLERK: 5567, United States vs. the Boat Patricia.

MR. SCHLEIMER: My understanding is, your Honor, that this is to be continued?

THE COURT: Yes, this is one where we have asked counsel to continue so as to make way for the resumption of argument in a case in which counsel are restricted as to the time they can be here. Mr. Chichester has been handling this case.

MR. SCHLEIMER: It is my understanding, your Honor, that the counsel were not to be present today, that it would go over for a week at any rate.

THE COURT: Yes.

MR. SCHLEIMER: I happened to be here on another matter, in the building, so I stopped in.

THE COURT: It just occurs to us that it had better go over two weeks. March 13th.

MR. SCHLEIMER: As I understand, your Honor indicated the last time you were here that you would advise us in advance as to whether or not you cared to hear further argument and on what particular points?

THE COURT: Well, in that regard, there really strikes us, there are two main questions, one of which we are inclined to think has been disposed of by a recent decision of the United States Supreme Court to the effect that if this boat be regarded as a foreign vessel, then the fact that the place of seizure was more than one hour's sailing from the territorial waters of the United States would make the seizure illegal. That, in other words, would relegate us to the second query, was the numbering of the boat in effect a legal registration of it so as to make it a domestic vessel?

MR. SCHLEIMER: I don't recall, your Honor, the case that you refer to, the recent case.

THE COURT: Well, that is that Canadian boat that was seized.

MR. SCHLEIMER: In San Francisco?

THE COURT: No, off the Atlantic, just a few weeks ago.

MR. SCHLEIMER: It is in the advance sheets?

THE COURT: Yes. I think it was decided—

MR. SCHLEIMER: I will find it, your Honor.

THE COURT: —either late in December or early in January, in which the Court held that the treaties

were paramount and prohibited the seizure of the foreign vessel at a place more than one hour's sailing from shore, and the proof in this case indicates that it was seized at a point more than one hour's sailing distance. And we suggest that to counsel because that leaves for further discussion the question,—did the fact that the Department gave this boat a number constitute it a domestic vessel?

MR. SCHLEIMER: I shall be prepared to meet that question. I believe I called your Honor's attention to the various provisions of the Act which made it illegal on the part of the Customs House Collector to number the vessel.

THE COURT: Well, it is not merely a matter of reading the statutory provisions. It is more a question of their application and their meaning. That is, the fact that something was done with reference to this boat that can be done ordinarily only with reference to a domestic vessel.

MR. SCHLEIMER: As I recall it, it makes a felony for the Collector to number a vessel owned by a foreigner. However, there are two decisions in which the statutory provisions are discussed when they are employed or applied to domestic vessels unless it is not to vessels owned by foreigners. However, I shall give this careful attention and I shall be ready to meet that.

THE COURT: It comes up then, two weeks from today.

MR. SCHLEIMER: Thank you, your Honor. In the afternoon, is it?

THE COURT: Yes.

LOS ANGELES, CALIFORNIA,
MONDAY, MARCH 13, 1933.
10 o'clock A. M.

MR. CHICHESTER: May it please the Court, in the matter of the Patricia; I understand counsel are objecting to our reopening the case for the introduction of further testimony, and for that reason we move that the matter be continued, that is, the hearing which is now set for this afternoon, until next Monday at 3:00 o'clock P. M., and at this time I make an oral motion and wish—it to be deemed a notice of motion to counsel that motion will be made next Monday at 3:00 P. M. in conjunction with the argument, which will, with your Honor's consent, be continued until that time, to reopen the case for the purpose of introducing testimony of a member of the Japanese Consulate or the Japanese Consul, which testimony will in effect and in substance be that the respondent vessel, Patricia, is not registered under the laws of the Japanese Empire, is not under the protection of the laws of the Japanese Empire, and does not carry and did not carry at the time it was seized the flag of the Japanese Empire. That testimony will be adduced through some member of the Japanese Consulate. That is the purpose of the further testimony of the Government.

THE COURT: Well, so far as the physical conditions are concerned at the time of the seizure of the vessel, perhaps counsel can stipulate concerning the facts, and if not, it will be a comparatively simple matter to introduce proof as to whether or not the vessel was flying

the flag of the Japanese Empire. The other matters apparently pertain to questions of the law of Japan.

MR. CHICHESTER: And the records of the Japanese Consul.

MR. SCHLEIMER: May it please the Court, the claimant objects to any motion made at this time, first, because an oral motion cannot be made. It must be made upon records, upon documents, or papers served upon me. Second, the motion is rather, or rather the complainant is guilty of gross laches of the worse kind. From the very inception of the case, when I stepped in, I urged the Court was without jurisdiction because this vessel was owned by a Japanese citizen. That was almost about a year ago. I kept on urging that on every hearing that we were in court and in every brief that we were required or we did submit to the Court. After the case was closed, at this time to come in and ask that this case be reopened for that purpose seriously affects our defense, for this reason: We urged as a preliminary motion before filing an answer to quash the proceedings, because of the insufficiency of the complaint, the failure to comply with the rules adopted by the United States Supreme Court. We urged a number of objections. Counsel well knew of this present situation and until the Court had indicated at the last hearing, the ruling and eliminated a number of points and limited the question to one particular point, they now come in and ask to practically introduce laws of Japan and they ask me that I should waive the right of the claimant for the purpose of this motion. There are a number of points that this

question will involve. There are other treaties, there are other laws to be considered, if they are to be allowed to make the motion.

Now, all I ask your Honor is this, and I suggested that to Mr. Chichester, that I have no objection to the matter being continued for another week if the Court is disposed to give time. Let him make the motion upon notice to me and upon affidavits, so that we will have a complete record, so that I can properly meet his contention, his claim. I don't propose to come in and stipulate at this time to something of which I have no knowledge at this moment. Your Honor heard him say that he wants to offer the laws, the laws of Japan, through the Japanese Consul.

MR. CHICHESTER: No such statement was made, your Honor, if I may make a suggestion.

MR. SCHLEIMER: Well, you said a minute ago that you wanted to—

THE COURT: Now, may we offer this thought: There are other counsel waiting here to be heard. We are satisfied that we will not go ahead with this hearing this afternoon. There will be no objection to a written notice of an application being made to reopen the case supported by whatever affidavit Government counsel may deem appropriate, and the matter can be noticed sufficiently in advance so that it can be heard two weeks from today instead of one week from today. And in that connection, may we point out that at the previous stage of the case the Court at the request of the respondent reopened this case and allowed the respondent

to present additional proof. And while we recognize that each side is entitled to be apprised in advance as to the nature and grounds of any motion, nevertheless, it is our view that this case should be decided upon its merits, and if either side has additional evidence to offer, provided that it gives the other side notice in writing as to the nature thereof before the case is ordered submitted, we believe that opportunity should be accorded, especially in a case such as this where a decision based upon one set of facts might be unwarranted by virtue of a change in some of those facts. The seizure of a vessel on the high seas is a serious matter, and the contention of the respondent that it involves a violation of the treaty with a friendly power only adds to the responsibility resting upon the Court to give consideration to only the facts and not when its attention is called to a situation that there is possibly some facts that have to bear upon the merits of the case not yet in the record. We shall continue these proceedings, then, until two weeks from today, and suggest that the application for reopening be given in writing and service be made at least five days prior to that date.

MR. CHICHESTER: Very well, your Honor.

MR. SCHLEIMER: May it please the Court, your Honor will remember I served the affidavit of the affiants and attached the exhibits so that I gave them full information as to what I wanted to introduce at the time when the Court would open the case for that proof and that is what I am asking them to do.

THE COURT: Well, undoubtedly that is what Government's counsel will do.

MR. SCHLEIMER: I may, after they serve me with the affidavits and the notice, I may consent to it, I don't know. But that is the point, I want to see it in writing, to see that they do it the same as I did.

THE COURT: Counsel is entitled to have it in writing.

MR. SCHLEIMER: Thank you. Is that 2 o'clock two weeks?

THE COURT: Two weeks, 2 o'clock.

MR. SCHLEIMER: Thank you.

(Whereupon, an adjournment was had to March 27, 1933 at 2 o'clock P. M.)

LOS ANGELES, CALIFORNIA,
FRIDAY, MARCH 24, 1933.
10 o'clock A. M.

THE COURT: The first matter we have has to do with is the motion to reopen the cause—

Mr. Chichester read the notice of motion dated March 14, 1933, and the affidavit of Frank M. Chichester sworn to March 14, 1933 to reopen the proceeding and to permit the libelant to offer additional evidence.

MR. SCHLEIMER: May I address the Court?

THE COURT: Just a moment. May we inquire whether or not there is any affidavit or affidavits to be considered other than the affidavit filed in support of the motion, Mr. Schleimer?

MR. SCHLEIMER: There has been an affidavit filed and served, my own affidavit, but since I prepared that affidavit I have read the reporter's transcript and par-

ticularly what Your Honor stated at the last hearing, and it occurred to me after studying it carefully, perhaps I did not get the drift of it when Your Honor stated it from the bench, that Your Honor desires to hear additional evidence on one particular issue so as to enlighten the Court in determining whether or not this vessel is an American or a foreign vessel.

Mr. Schleimer then read the affidavit of Max Schleimer filed March 22, 1933 in opposition to said motion.

THE COURT: That is the sole issue to which further evidence is directed, as we understand it.

MR SCHLEIMER: As to that, Your Honor, since the Court has indicated, I am not disposed to stand in the way. I will aid the Court in submitting the evidence. I have subpoenaed the records of the Collector of Customs, and I have also here the man who has charge of these records, and who has been in the Customs House in that particular branch for the last 16 years, and we are ready to offer this evidence on that sole issue.

MR. CHICHESTER: May it please the Court—

MR. SCHLEIMER: Now, one moment.

MR. CHICHESTER: Pardon me.

MR. SCHLEIMER: One moment please. There is a statement in my affidavit that I have never disputed, never claimed throughout this proceeding that this particular vessel was either registered or documented by the Japanese Government. My contention from the very inception of the case was that this vessel is owned by a foreigner, and that the nationality of the foreigner is the nationality of the vessel. So that would perhaps eliminate a great deal of testimony on the part of the Government.

THE COURT: Well, perhaps we might ask Government counsel to state in substance the proof to be offered and before that is done, we notice that this hearing was originally scheduled for next Monday afternoon, and we understand that both sides consent that the hearing may be advanced and proceeded with at this time?

MR. CHICHESTER: Yes.

Mr. Schleimer: Yes, Your Honor, I consent.

THE COURT: Well, then, may we ask Government counsel to outline the proof to be offered and perhaps it can be covered by stipulation?

MR. CHICHESTER: My intention was to obtain from the Japanese Consulate, either through the Consul or Vice-Consul, the record books which I understand they have in their possession of all vessels registered and recognized by the Japanese Government as being Japanese under their registry laws, that is, laws of a similar nature to our own laws. To also obtain the information from the Consul concerning the use of the word "Maru", concerning a Japanese vessel, a vessel recognized by the Japanese Government, and further to obtain the information from the Consulate, if he has the information, whether or not the vessels registered according to the laws of the Japanese Empire are the vessels, only vessels protected by treaties entered into between the government of Japan and any other foreign governments. Now, the last inquiry, the information may not be in the hands of the Japanese Consul. I do not know. I have had no opportunity to interview him. And there is also the further possible objection that it may be a conclusion which he is not qualified to give. I intended to ascertain from him whether or not he was so qualified.

THE COURT: Well, first of all, may we inquire, is there any dispute as to the fact that the vessel seized was one which at no time had been registered or licensed or documented by the Japanese Government, or as to which the Japanese Government at no time took any action. May we proceed that far?

Mr Schleimer: I will stipulate only that this particular vessel was not registered, licensed or documented by the Japanese Government, but with that stipulation, I wish to add that that is entirely immaterial. We are now concerned by our own laws and not what took place in Japan. Our own laws, as to the effect of our contention.

THE COURT: Well, we recognize, of course, that there is a question of law pertaining to the facts just mentioned. For the present we are endeavoring to ascertain what the record is upon the facts, leaving, of course, to be considered, the question or questions of law. Is there any dispute as to the fact that this vessel did not fly the Japanese flag?

MR. SCHLEIMER: The testimony shows that it did not fly any flag. That has been testified to by Mr. Tomikawa. If your Honor cares to see the transcript, I have it here.

THE COURT: Well, there is no need of retracing our steps if it is agreed that the vessel did not fly any flag.

MR. CHICHESTER: That is agreed.

MR. SCHLEIMER: Yes, it is.

THE COURT: Possibly that is the witness.

MR. CHICHESTER: We may be able to simplify the matter by proceeding with the witness and disposing of the witness in that manner.

MR. SCHLEIMER: Yes.

THE COURT: Well, now, let us see how far we can make progress before calling the witness.

MR. CHICHESTER: If I may suggest, your Honor, first I will accept the part of the stipulation offered by Mr. Schleimer, that the Patricia was never registered, enrolled, licensed, or documented, or was given any other document in lieu of those documents by the Japanese government. Is that the extent of your stipulation, Mr. Schleimer?

MR. SCHLEIMER: Substantially, it is. I did not use the words "any other document." I just limited myself to "it was not enrolled, documented or licensed."

MR. CHICHESTER: Well, I wanted the stipulation because I do not know what words the Japanese language might have to encompass all of those words, and I intended that all of the words which we have in the English language be covered to include documenting of any kind of any such boats because I do not believe that any such document was given by the Japanese Government to this boat.

THE COURT: Well, this might clear up the matter. Is it claimed by the claimant that the Japanese Government issued any license, or document, or number, or paper of any kind with respect to this boat?

MR. SCHLEIMER: May I be permitted to simplify this, your Honor, in my own way? I will admit, if the Court pleases, that outside of the numbering of this vessel which was done at San Pedro, no other Government or body had anything to do in numbering or enrolling or registering this particular vessel.

THE COURT: Or licensing it?

MR. SCHLEIMER: Including that, your Honor.

THE COURT: Or issuing any document in respect to it?

MR. SCHLEIMER: That is correct.

MR. CHICHESTER: That is agreeable.

MR. SCHLEIMER: But your Honor will recall that I still contend that that is irrelevant and immaterial.

THE COURT: Yes, the Court understands that there is still open the question of law as to what is the legal effects of the facts.

MR. SCHLEIMER: That is correct.

MR. CHICHESTER: I think possibly—

MR. SCHLEIMER: I think that covers it, that covers the whole thing.

MR. CHICHESTER: I don't think it covers the whole thing. If I may call the witness for one or two questions as to the conclusions which I mentioned to your Honor, which he may or may not be able to give?

MR. SCHLEIMER: Well, as to that, we might as well take that up now because I shall object, that is calling for expert testimony involving the construction of the law of Japan.

THE COURT: Well, of course, it would be necessary to lay the foundation to ascertain whether or not this witness is qualified to answer it.

MR. SCHLEIMER: I doubt whether he would be qualified.

MR. CHICHESTER: I can find out.

THE COURT: Yes.

MR. CHICHESTER: I will call Mr. Ozawa.

(Testimony of Kakichi Ozawa)

KAKICHI OZAWA

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

In Answer to MR. CHICHESTER:

I am vice consul of Japan. My office is 620 Chamber of Commerce Building, Los Angeles. I have been engaged as the vice-consul of Japan in America about one year and a half. I was the attache of the Japanese Embassy at Washington, D. C. I was transferred here about one year and a half ago. I have been attache of the Japanese Empire at Washington, D. C., about one year and a half. Prior to that I was in the service of the Foreign Office in Tokio for more than a half a year. After my graduation at the Japanese University I entered the Foreign Office and at the same time I was appointed as an attache of the Japanese Embassy. I am a graduate of the Tokio Imperial University I did not study all laws but I studied the political Department of the Tokio Imperial University. I only studied the Civil Code and the Criminal Code of Japan. Political Science. The course of the University was three years.

THE COURT: Well, subsequent to your graduation from the University have you devoted any time to the studying of the laws of Japan with reference to the registry or licensing or documenting of vessels?

A No, not at all.

Q And by your answer, do you mean that you do not know what the law of Japan is with reference to

(Testimony of Kakichi Ozawa)

the licensing, or the registering or documenting of a vessel?

A No, I do not know.

Q Have you produced some records here?

A Yes.

Q And what is the nature of the records you have produced?

A I have brought here the laws concerning the Japanese ships published by the Bureau of Ships of the Department of Communication of Japan.

Q You know that that is an official publication?

A Yes, an official publication.

Q Of the Japanese Government?

A Yes.

BY THE COURT: Well, before the Court rules upon it, may we ask the gentlemen to allow the Court to examine the book?

A Yes.

Q It is evidently written in the Japanese language?

A Oh, yes.

Q THE COURT: So that prevents the Court from reading it. Well, now, have you turned to a particular page here?

A Oh, no.

Q THE COURT: Well, now, have you made some examination of this book with reference to what it contains on the subject of the registry or the licensing or the documenting of vessels?

MR. SCHLEIMER: Will your Honor permit me to interpose an objection to the question of the Court?

THE COURT: Yes.

(Testimony of Kakichi Ozawa)

MR. SCHLEIMER: I respectfully object to the question on the ground that the witness is not qualified to answer the question placed by the Court.

THE COURT: It occurs to us that there is a distinction between knowing the law of the country and stating whether or not a person has read a particular book or any portion thereof Our question seeks to elicit information which strikes us any University graduate, whether he be learned in the law or not, can answer whether or not he has read a book on the particular subject, can answer whether or not the subject matter which he has read pertains to one or another topic One need not be licensed to practice law to be able to say that he has read a book purporting to deal with the subject matter of the law of torts, for example, and in substance that is the purport of the Court's inquiry, namely, has this witness read from the book that he has before him in which the witness has testified is a part of the official publications of the Japanese Government, whether in that book he has read anything pertaining to the subject matter of the registering, the licensing or the documenting of vessels by the Japanese Government. For that reason we hold that the objection is not well taken It is overruled and you may have an exception.

BY THE COURT:

Q Have you read any part of this book?

A Oh yes, only the part about the registration of Japanese vessels.

Q Well now, will you turn to that part of the book that you read on that subject?

A Yes sir.

(Testimony of Kakichi Ozawa)

Q On what page is it found?

A Page 1 and page 2.

Q Pages 1 and 2?

A Yes.

Q Will you read from the book the passage or passages to which you have referred?

MR. SCHLEIMER: I respectfully object to it upon the ground that it is irrelevant and it is incompetent. We have conceded, may it please the Court, certain facts, and hence this is entirely immaterial.

THE COURT: It may be immaterial, but to our mind the only way to determine whether or not it is immaterial is to learn what, if anything, the law of Japan says upon the subject.

MR. SCHLEIMER: We have admitted the fact, Your Honor, that this vessel has not been enrolled, has not been documented, and has not been licensed in Japan. This becomes irrelevant and immaterial to the issue.

MR. CHICHESTER: We submit, your Honor, we do not know whether it is material—

THE COURT: May we enquire, counsel, do you know what this book says upon the subject?

MR. SCHLEIMER: I never saw the book and do not know anything about it.

THE COURT: Well, we think the Court at least ought to find out what the book does say upon the subject and then determine whether or not it has any bearing upon our problem. The objection is overruled.

MR. SCHLEIMER: May we have an exception, your Honor?

THE COURT: Yes.

(Testimony of Kakichi Ozawa)

BY THE COURT:

Q Now, Mr. Ozawa, will you read the passage or passages to which you have referred? Will you just read it slowly?

A I must admit that I read English poorly, so I must take a little time.

THE COURT: That is quite all right.

A The article 5 of the law of vessels, says that the owner of Japanese ships must register in the original book of vessels at the governmental office of the port which has the jurisdiction of the port. I want to refer to another article, article 8. The name of the Japanese vessels cannot be changed—

THE COURT: You say can not?

A Can not, can not be changed without permission of governmental office of the port. That is all. And I have brought here the indicia of all Japanese vessels published by the Department of Communication of Japan.

Q Now under what date is that book published?

A This book was published in 1929 by the Department of Communications.

THE COURT: Does the record show that the vessel in question was owned by an American citizen prior and up to March 18, 1932?

MR. SCHLEIMER: Does your Honor refer to the record in this case, or the record of the Collector of Customs?

THE COURT: Well, our first question was as to the record in this trial? If not, can we cover the matter by stipulation?

(Testimony of Kakichi Ozawa)

MR. SCHLEIMER: We have the entire record here of the history of the vessel. We have got it right here.

THE COURT: From your examination, what does that record show?

MR. SCHLEIMER: The record shows that it was built in the United States for a Japanese citizen. That certain cards that are in court were signed by the original owner, the Japanese, and are filed with the Collector of Customs showing that it was owned by a Japanese citizen. There are three such cards, showing the names of the owners right up to the present, to my client whom I represent. Also, the record shows that the prior owners paid to the government light money.

THE COURT: Paid what?

MR. SCHLEIMER: "Light money", that is under section 128 of chapter 46 of the U. S. C. A. Called "light money", which I presume means for maintaining the lights along the coast. The section reads, "light money". It also indicates, the statute also indicates that the Government can only collect light money from vessels owned by foreigners and the Government cannot collect light money from vessels owned by citizens of the United States. The record shows and the books show which are in the office of the Collector, that this is a Japanese vessel, not an American vessel; an American built Japanese owned vessel.

THE COURT: Now what does the record show as to when the vessel was built?

MR. SCHLEIMER: In 1924.

THE COURT: In 1924?

(Testimony of Kakichi Ozawa)

MR. SCHLEIMER: And the name of the builder, I believe, is entered there, and the name of the owner for whom it was built.

THE COURT: Now, does the record show that the boat was always known under the name of the Patricia?

MR. SCHLEIMER: Yes, your Honor, and always under that number of 970-A, from the beginning, the very beginning.

MR. CHICHESTER: We think the best evidence of that is in the record, your Honor.

MR. SCHLEIMER: Well, I am telling your Honor—

THE COURT: Well, if counsel can save us the time and tell us what the record recites—

MR. SCHLEIMER: I am ready to show it to you. There is no question. I have subpoenaed these records.

Q BY THE COURT: Now, may we ask you, Mr. Ozawa, this publication of the Japanese Government under date of 1929—

A Yes.

Q —is a part of the official publications of your Government?

A Yes.

Q And is that record published in such form or manner as to indicate the names of the owners of vessels or the names of the vessels and to whom the same have been registered, or what is the information, the character of information, disclosed by that book?

(Testimony of Kakichi Ozawa)

A This book includes the number and tonnage and owner and the port of the vessels.

Q. The record is kept according to the name of the owner?

A Oh, yes.

Q BY MR. CHICHESTER: The name of the owner in this case is Toychi and his last name is Tomikawa.

MR. SCHLEIMER: I don't recall how he spells it, but I think it is T-o-c-h-i.

THE COURT: Well, may we ask, is the witness here from the office having charge of these Government records?

MR. CHICHESTER: Yes, your Honor. Mr. Metcalf.

MR. SCHLEIMER: Mr. Metcalf is right here. He has the original records.

THE COURT: You might be sworn and perhaps we can shorten this examination. We might interrogate Mr. Metcalf for a moment or two prior to a possible further interrogation addressed to the Consul.

MR. SCHLEIMER: So I will understand, your Honor suspends with this witness for the moment?

THE COURT: Yes, you can remain in that chair for a moment. Mr. Metcalf can take another chair there.

(Testimony of Carl O. Metcalf)

CARL O. METCALF,

called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

Q BY THE CLERK: Your name?

A Carl O. Metcalf; M-e-t-c-a-l-f.

BY THE COURT:

Q Mr. Metcalf, what position do you hold with the Government?

A Chief Clerk of the Marine Department, United States Customs, at the Port of San Pedro.

DIRECT EXAMINATION

In answer to MR. SCHLEIMER:

A At the Port of San Pedro. I held that office since 1916. I have pursuant to a subpoena duces tecum produced certain records. I took these records from the Customshouse records at San Pedro. I have them here now. (Three cards were thereupon produced by the witness.) The signatures K. Uyegi and O. Uyemoto are two persons. On the card July 12, 1924. On application of O. Uyemoto and K. Ujeji or an number for an alien-owned vessel, No. 970-A, was awarded by the office of the Collector of Customs, Port of Los Angeles, on July 12, 1924. That was the first time that that number was awarded to that particular vessel. I could not say the name of the builder, but I think the records show that it was built by Uyeji at the Terminal Boat Shop, Terminal Island, California. This boat was sold to Kioo Agawa, 806 Commercial Exchange Building, Los Angeles, California, bill of sale, no date, and he registered on July 11, 1930.

(Testimony of Carl O. Metcalf)

He gave his name as George Kioo Agawa, 806 Commercial Exchange Building, Los Angeles. That was July 11th. The boat was sold by George Kioo Agawa to T. Tomikawa, bill of sale dated March 13, 1932, and registered in the office of the Collector of Customs on March 18, 1932, to T. Tomikawa, 712 Tuna Street, Terminal Island, California. The meaning of the name on the line "Owner or Master, Shinajaro Hirata". He was the gentleman who registered the boat in the name, presented the bill of sale and registered the boat in the name of George Kioo Agawa. "Master" is what it should have been. We hardly ever scratch it out. In this case and the next case the owner and master was just the same. The answers that I gave are from the records in the office that I produced.

THE COURT: Just a minute. Will you hand this to the witness?

MR. SCHLEIMER: Yes, your Honor.

Q BY THE COURT: What is that record you are now examining?

A This is a light money record for alien-owned vessels built in the United States and operating out of the Port of Los Angeles.

Q BY MR. SCHLEIMER: Will you kindly explain what you mean by "light money"?

A Well, if you will permit me, I will read—

Q You mean, under the statute?

A Yes.

Q Section 128 of U. S. C. A., Chapter 46, is that what you mean?

A Yes. I have got it here some place.

(Testimony of Carl O. Metcalf)

MR. SCHLEIMER: Has your Honor got 46 U. S. C. A.?

THE COURT: No, not here. You may proceed.

A The title of this regulation is "Light Money in Exceptional Cases." It reads as follows: "A duty of 50 cents per ton, to be denominated 'light money' shall be levied and collected on all vessels not of the United States, which may enter the ports of the United States. Such light money shall be levied and collected in the same manner and under the same regulations as the tonnage duties."

Q BY THE COURT: Now, just what is the section reference that you have read?

A This is R. S. 2245, U. S. C., Title 46, Section 128.

MR. SCHLEIMER: It is now called U. S. C. A., 128.

THE COURT: Section 128?

A Yes.

MR. SCHLEIMER: Yes, your Honor.

In answer to MR. SCHLEIMER:

This book is the first record that we had in the light money book of Patricia, which first payment of light money was made on September 26, 1924, in the amount of,—it is in my other book—I think it is $108.50—in the amount of $108.50. Now, one dollar of that light money is for five certificates at 20 cents each. 50 cents a ton on 43 net tons would be $107.50, and five certificates at 20 cents each would be $1.00 more. That makes $108.50 which we collected from the owner of an alien-owned vessel.

(Testimony of Carl O. Metcalf)

Q BY THE COURT: Now, what do your records show, if anything at all, as to the dimensions of the boat or the tonnage thereof?

A The records show that the vessel is 71 gross tons and 43 net. And we collect on the net tonnage.

THE COURT: Just a moment. Mr. Reporter, will you read the answer?

(The Reporter thereupon read the last answer to the Court.)

Q BY THE COURT: And do the records show anything about the size? One of those books seems to have some figures in it.

A This one right here, this simply shows, length 80 feet, beam 18 feet; horse-power, 100.

Q Length what?

A 80 feet.

Q The beam?

A 18.

MR. SCHLEIMER: And horse-power 100.

A I might state, your Honor, that I was unable to locate the Admeasurement of this vessel in the files.

MR. CHICHESTER: I have a copy of it, your Honor.

A I think maybe you have got it. Maybe you didn't return it. If you will note, your Honor, that 43 tons at 50 cents per ton is $21.50 an entry, and then 20 cents for a certificate. That would make $21.70, and then five times that would be $108.50.

Q BY MR. SCHLEIMER: And what year was that for?

A Well, the last payment was made March 18, 1932.

Q Now, you issue certificates of payment of the tonnage tax and the light money, do you not?

A Yes, sir.

Q And you keep a copy of each such certificate in your office, do you not?

A Yes, sir.

Q I show you (counting) 1, 2, 3, 4, 5, 6; 6 certificates—

A One of these, I might add, is the official receipt.

Q Copy of the official receipt?

A Yes, one of them is a copy of the official receipt and the five other certificates are showing the payment of tonnage tax. The first sheet shows payment No. 1, and then payment No. 2, 3, 4 and 5.

Q You produced them in Court, did you not? I say, you brought them to Court, did you not?

A I brought them here, yes.

Q Where did you take them from?

A I took them away from the records of the Customs House.

Q Those are the duplicates kept in your office?

A Yes, sir, I got those out of the Cashier's office.

MR. SCHLEIMER: I offer those in evidence, your Honor.

THE COURT: Well, is there any need of keeping these?

MR. SCHLEIMER: No, no, just simply to refer to in case it becomes necessary, so we might have them. I just want them identified.

THE COURT: Well, they might be marked as claimant's.

(Testimony of Carl O. Metcalf)

THE CLERK: Exhibit 1.

A They have to go back to the office.

MR. SCHLEIMER: Yes, that is all right. I simply want to show that they were offered and in case it becomes necessary, we can have copies made of them.

THE COURT: These certificates are numbered respectively 424,163 to 424,167, inclusive, and the copy of the official receipt referred to by the witness is designated No. 418,506, and each of these documents bears date March 18, 1932. May it be deemed that the documents have been read into the record and they may be withdrawn and returned to the witness?

MR. CHICHESTER: So stipulated.

MR. SCHLEIMER: I stipulate to that. May I at this time also, if the Court please, offer in evidence these three cards that the witness referred to in his testimony? They may become material.

THE COURT: Well, may we stipulate that the three cards have been read into the record without retaining the documents?

MR. CHICHESTER: So stipulated.

MR. SCHLEIMER: So stipulated. And what number shall we give them?

THE COURT: They don't need any number.

MR. SCHLEIMER: All right, your Honor.

THE COURT: May we inquire of Government counsel, is there any need for reading into the record any portion of this certificate of Admeasurement?

MR. CHICHESTER: I think not. Mr. Metcalf has given the dimensions and the tonnage of the boat, and

(Testimony of Carl O. Metcalf)

that is about the only part of that that I think was necessary.

MR. SCHLEIMER: I would like to see it. I tried to find it and spent nearly half a day yesterday to see if we could find it and I don't know whether this is an original or a copy.

A That is a copy.

THE COURT: Well, there is some slight difference we note here.

A Is it in the length, your Honor?

THE COURT: This certificate of Admeasurement, may it be stipulated the same has been read into the record without leaving the document here?

MR. CHICHESTER: Yes, your Honor.

MR. SCHLEIMER: Yes.

THE COURT: The certificate of Admeasurement bears the notation in the upper left hand corner in typewriting, the word "Alien," which is likewise in quotations. The upper right hand corner—

MR. CHICHESTER: If your Honor desires, if I may interrupt, that may be introduced in evidence. It is a copy and I have no need of it in my files. It is not the original.

Q BY THE COURT: You don't need this, then, do you?

A No, sir.

THE COURT: Well, then, it may be filed and marked as Claimant's next exhibit.

THE CLERK: That is exhibit "B".

(Testimony of Carl O. Metcalf)

MR. SCHLEIMER: What is exhibit "A"?

THE CLERK: The chart, your Honor.

THE COURT: Very well. It may be marked as Claimant's exhibit "B".

MR. SCHLEIMER: May I at this time, your Honor, offer in evidence this page?

A That is a record of light money.

MR. SCHLEIMER: The record of light money and the particular part of that I want to call to your Honor's attention is the entry on top, if I may show your Honor, "Nat.," which I suppose is taken for a short abbrevation of "Nationality of Owner." Is that correct?

A Yes.

Q BY MR. SCHLEIMER: Then "Tonnage," is that right?

A Yes.

Q The abbreviation for "tonnage"?

A "Tonnage year begins."

Q And then the "nationality of owner," and under that column is "Jap.," which I suppose, Mr. Metcalf, "Jap.," I suppose is the abbreviation for Japanese?

A Japanese. "Japanese Oil Screw, Owner, T. Tomikawa, 712 Tuna Street, Terminal Island, California. Tonnage year begins July, 1924. Amount, $108.50."

Q BY THE COURT: Now, that is an entry appearing in what book?

A In the record of light money on alien-owned vessels.

Q And you are reading from what page of that book?

(Testimony of Carl O. Metcalf)

A It has no page, but it is the first page under "P," the letter "P".

Q And it is a record kept under the name of the boat?

A Yes, sir. The number is also there, but we keep it under the name.

MR SCHLEIMER: As your Honor will note, the number is printed.

A "970-A. Oil Screw Patricia, 43 net, Japanese, T. Tomikawa, 712 Tuna Street, Terminal Island, California."

Q BY THE COURT: The Record there entered is to the effect that the owner of the boat is a Japanese subject?

A Yes, sir. I might add, your Honor, that this vessel has never been registered otherwise than by Japanese ownership.

MR. SCHLEIMER: May I at this time also offer in evidence the book produced by this witness?

Q BY MR. SCHLEIMER: What do you call this book?

A That is the same thing only it is an older book. That is the first entries of the light money on the Patricia, 970-A.

MR. SCHLEIMER: I would like to have that marked for what it is worth.

THE COURT: Well, let the witness read it into the record.

Q BY MR. SCHLEIMER: All right. Read it right in from whatever record you have there.

A Reading from the Record, "Alien-owned vessels, tonnage tax and light money."

(Testimony of Carl O. Metcalf)

Q What page?

A First page of letter "P" in the index. "Vessel Patricia, No. 970-A, net tonnage, 43, Jap."

Q What does that stand for, "Jap."?

A That means that is the nationality of the vessel, as we classify it. I might add if it is an Austrian owned vessel, we class it as an Austrian vessel, Portuguese, Portuguese vessel.

Q And in this instance you classed it as a Japanese vessel?

A Yes, sir.

Q All right; proceed further.

A "Owners K. Uyeji and O. Uyemoto, Japanese, post-office box 111, Wilmington, built by (blank), at Terminal Island Boat Shop, Recorded July 12, 1924, length, 80 feet, beam 18 feet, horse-power, 100. Tonnage year begins July, 1924. First payment of tonnage or light money made on September 26, 1924, all five payments paid at the same time. Total amount, $108.50.

Q And the tonnage and the light money was paid on this vessel from 1924 up to—

A 1932, March, 1932, was the last payment. There is no other payment due until March, next year, now—there is a payment due now.

Q This month?

A That is, providing the vessel is operating. I might add that these payments are due, your Honor, on each entry of the vessel for five different entries, but on account of the inconvenience to which it puts masters and owners of these vessels to come in every trip, why, we generally collect the total amount upon one entry. That

(Testimony of Carl O. Metcalf)

allows them to go in and out whenever they please during that tonnage year.

Q Does your office collect light money from vessels owned by American citizens?

A No, sir.

Q That is under your regulations and under the statute, is that correct?

MR. CHICHESTER: That is objected to as calling for a conclusion of the witness and a matter of law entirely.

THE COURT: There hardly would be any dispute about the law not authorizing the collection of light money on vessels owned by citizens of the United States. Now, is there any other testimony to be elicited from this witness, Mr. Metcalf?

MR. CHICHESTER: May I ask this one question?

CROSS EXAMINATION

BY MR. CHICHESTER:

Q You say five times this light money is taxed. Now, is that the maximum that can be taxed against this vessel?

A Yes, sir.

Q So that it may come and go as it pleases?

A Yes. He is required to make five payments, that is, if he enters the Port of Los Angeles five different times a year he is required to make five payments, and we have always collected the total amount upon one entry and that saves them the trouble of coming in and making the payment at five different times, five different payments.

(Testimony of Carl O. Metcalf)

Q The card you refer to has Shinajaro Hirata as the master of the vessel, showed him to be the master on that date?

A That is the first registration, I think. That was dated July 11, 1930.

Q Was he the master when the boat was transferred to Tomikawa?

A I couldn't say.

Q Anything to show?

A We have no records as to that.

MR. CHICHESTER: No records. That is all.

A All right.

REDIRECT EXAMINATION

BY MR. SCHLEIMER:

Q These three cards of ownership, as I would call them, that you produced here and the two books regarding the tonnage and light money are the only records that are kept in your office regarding this particular vessel with the exception of the—

A Admeasurement.

Q The Admeasurement, is that correct?

A Yes, sir.

Q Has this particular vessel ever been registered in your office as an enrolled or licensed or documented vessel?

A No, sir, it has not.

Q It has not?

A No.

Q Why not? Do you know?

A Being alien-owned—

(Testimony of Carl O. Metcalf)

MR. CHICHESTER: That is objected to as immaterial and argumentative.

Q BY MR. SCHLEIMER: Well, he can answer that. We will just simply have to call his Honor's attention to it, and he can give it to us in a second.

MR. CHICHESTER: May it please the Court, it is calling for a conclusion which is entirely based upon the law of this case, why the vessel was or was not registered, which is not within the witness' knowledge.

THE COURT: Well, it really would be a statement of the witness' conclusion, but at any rate, as we understand the matter, the witness having answered that this boat was never registered or enrolled, it is the contention of the claimant that the reason for that absence of enrollment or registry is because the laws of the United States do not permit the same.

MR. SCHLEIMER: Yes, that is correct.

MR. CHICHESTER: It is a matter of law.

MR. SCHLEIMER: That is correct. If your Honor will pardon me a second?

Q BY MR. SCHLEIMER: Has there been any certificate ever issued to the owners, the prior owners, of Toychi Tomikawa as to the numbering of this vessel?

A Certificates?

Q Yes, any certificates ever been issued of any kind?

A No, simply the award of number.

Q That is all?

A That is all.

Q No other certificates?

A No.

(Testimony of Carl O. Metcalf)

Q Well, the award of the number was simply entered on the cards; there was no certificate issued?

A Well, there was a little certificate issued which shows the number awarded and how to place it on the boat.

Q Have you got a form of that here?

A No, I have not.

Q Well, I will show you this. This is a copy. Is that what you refer to?

A Yes, sir.

Q Mr. Chichester?

MR. CHICHESTER: I think I have the original.

MR. SCHLEIMER: You have got it all. We were looking for it all afternoon.

A That is why we could not find it.

Q No wonder you could not find it. He probably got that from the boat, the original. This is the certificate you refer to?

A Yes, sir.

MR. SCHLEIMER: I offer that in evidence.

A (Continuing) Yes, T. Tomikawa.

THE COURT: The same may be marked Claimant's exhibit next in order.

THE CLERK: Exhibit C.

THE COURT: You have no objection, Mr. Chichester, to it going in? Pardon me just a moment.

Q BY MR. SCHLEIMER: Is that your signature?

A Yes, sir.

Q At the bottom of it?

A Yes, sir.

(Testimony of Kakichi Ozawa)

Q That shows that this certificate was issued by you?

A Yes.

THE COURT: It may be marked exhibit C.

THE CLERK: Exhibit C.

THE COURT: Is that all of Mr. Metcalf?

MR. SCHLEIMER: Yes, your Honor.

MR. CHICHESTER: That is all, Mr. Metcalf.

THE COURT: Now, just a moment before you leave the room, so as to complete whatever there may be to these records.

KAKICHI OZAWA,

recalled as a witness on behalf of the Government, being previously duly sworn, testified further as follows:

In answer to THE COURT: I examined the publication issued by the Japanese Government under date of 1929, for the purpose of ascertaining whether there is any entry therein with reference to a boat owned by T. Tomikawa. It is arranged in the alphabetical order of the name of the owner. In this book there is no name of Patricia. It has no name of Patricia.

REDIRECT EXAMINATION

In answer to MR. CHICHESTER: The Japanese Government assumes responsibility for the vessels named in that book.

In answer to THE COURT: I did not particularly study. I made no special study concerning the matter. Other rules of our Government must make protection of the Japanese subject and the Japanese vessels when they are out of the country.

(Argument.)

(Testimony of Kakichi Ozawa)

In answer to THE COURT: There is a legal advisor with the Japanese Consulate. His name is Mr. Nimmo. He is the legal advisor to the Japanese Consulate in Los Angeles. He is an American lawyer. He is an American.

(Argument.)

RECROSS EXAMINATION

In answer to MR. SCHLEIMER: This book contains all Japanese vessels registered in the Japanese Ports regardless of the tonnage. You know, to be called Japanese ships, the ship must be registered at some Japanese port. A ship only owned by Japanese subjects does not mean Japanese vessels. This book does not contain vessels that are owned by Japanese in foreign countries. This book only contains vessels that have been registered, licensed and documented by the Government of Japan. I have no translation of the book of laws that I have produced here today. I translated literally.

MR. SCHLEIMER: That as all, your Honor.

MR. CHICHESTER: That is all.

THE COURT: It occurs to us the witness has on cross examination possibly answered Government counsel's query.

MR. CHICHESTER: I think so, your Honor.

THE COURT: That is all.

MR. SCHLEIMER: Did you say you think so? I did not hear that.

(Testimony of Kakichi Ozawa)

THE REPORTER: That is what I understood him to say, "I think so."

THE COURT: Now, the Court has this observation to make: As we said on a prior occasion, we are inclined to the view that under the decision rendered by the United States Supreme Court under date of January 23, 1933, in the case entitled "Frank Cook, Petitioner, vs. the United States of America," that this vessel, if an alien vessel, having been seized more than one hour's sailing distance from shore, and as we understand it, that is not disputed?

MR. CHICHESTER: No, your Honor.

THE COURT: Was unlawfully taken, or would be regarded as unlawfully taken into custody by Agents or employes of the United States. Hence, there remains for consideration the question, Is this vessel to be regarded as an alien boat under the circumstances disclosed by the evidence presented?

The Court finds itself very much in doubt upon that question and is inclined to believe that the laboring oar, so far as convincing the Court is concerned, still rests with the Government.

MR. CHICHESTER: I did not understand that, your Honor.

THE COURT: Read it.

(The Reporter thereupon read the last paragraph of the Court's statement.)

THE COURT: These records produced from the Customs Office are, to say the least, somewhat persuasive, for example, to the extent of disclosing that one branch of the Government has treated the vessel in question as a foreign boat as one, subject, at least, to the burdens of a foreign vessel, and the question naturally presents itself, the Government in one branch having construed the facts pertaining to the ownership, or, if you please, the origin of this boat, as being a foreign vessel, and hence, subject to the burdens imposed upon vessels of that character, have we not at least persuasive reasoning that the construction thus placed upon the boat by the Customs Service, by men presumably qualified and experienced in these matters may be the correct interpretation? Apparently, the chief, if not the sole, basis for the Government's contention here that the United States, rather than the Government of Japan, has jurisdiction, arises over the course of conduct of that very branch of the service in numbering the boat, and which course of conduct that branch of the service has construed to be the numbering of an alien vessel. In other words, as we understand the Government's position, in the light of this recent decision of the United States Supreme Court, the only basis for asserting jurisdiction here arises out of the circumstances connected with the numbering of this vessel by the Customs Department. When we come to inquire into the records of that department, we find that in so dealing with this boat their activities were with the view of deal-

ing with a foreign vessel and not with a vessel either belonging to a citizen of the United States, or registered or licensed under the laws of the United States, or amenable to its jurisdiction, except to the same extent and no further than any other alien vessel. We mention all these considerations at the present time in order that Government counsel may be apprised of the trend of thought on the part of the Court and indicate the point respecting which any additional authority, if presented, should be directed. At this stage, may we inquire of Government counsel, have we in substance, at least, stated the Government's position?

MR. CHICHESTER: Yes. your Honor. I think that the Court and Government counsel are entirely in accord on the questions to be covered by the law, and I think we are in position to answer those questions at such time as your Honor cares to hear from us.

THE COURT: Well, it is now one oclock and we can take it up this afternoon, say at 2:30.

MR. CHICHESTER: That is agreeable, your Honor.

MR. SCHLEIMER: That is satisfactory, your Honor.

THE COURT: Recess until that hour.

(Whereupon, at 1:00 o'clock P. M., a recess was taken to 2:30 o'clock P. M.)

LOS ANGELES, CALIFORNIA, FRIDAY, MARCH 24, 1933. 2 o'clock P. M.

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MR. CHICHESTER: May it please the Court, the situation as I see it now, from our session this morning, and from the evidence we have taken, it is a question of determination as to whether or not the Vessel "Patricia" is a vessel—is a Japanese vessel, is the first point, and as to the second point, whether it is subject to the protection of the treaties between the United States and Japan. As to the second point, I invite your Honor's attention to the treaty relied upon by counsel in his brief heretofore referred to. It is the familiar 12 mile limit—that is the name used by counsel for that treaty with respect to the coast of the United States, against foreign vessels importing intoxicating liquors, smuggling them into the United States. That treaty is found in volume 46 Statutes at Large, Part 2, beginning at page 2446.

THE COURT: Just a moment. May we have, Mr. Reporter, that reference?

(Thereupon the Reporter read the reference last above.)

MR. CHICHESTER: I desire at this time to call your Honor's attention to what to me appear to be the pertainent parts of the treaty with respect to this vessel. The Treaty is by the President of the United States of America, and the proclamation is in the usual form, naming the contracting parties as the United States of America and the Empire of Japan by their duly authorized officers. Article 1 provides "The high contracting parties

declare that it is their firm intention to uphold the principle that three marine miles extending from the coast line outwards and measured from low-water mark constitutes the proper limits of territorial waters."

Article 2 provides: "(1) The Japanese Government agree that they will raise no objection to the boarding of private vessels under the Japanese flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions, in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be *intiated*."

There is a limitation placed upon that Article II as to the boarding of Japanese vessels, and that is that the distance of such boarding is limited to an hour's cruising time, and depending upon the speed of the vessel being pursued, that is, assuming there is a pursuit. In this case, the speed of the "Patricia" is 7½ to 8 knots an hour, and I believe from the facts we can agree it is within an hour's *cursing* time, because the evidence shows it was seized 10½ miles from the coast of the United States. Of course, if the Patricia as a Japanese vessel is within the protection of this treaty, then I believe counsel's point as to the jurisdiction is well taken under the Mazel Tov, decided in Cook vs. the United States. However, it is our contention that the "Patricia" in the first

place is not a Japanese vessel, and in the second place, even assuming that under the cases which counsel has cited—Hallock vs Jenks, I believe, is one of them—under that line of authority, that the nationality of a vessel is determined by her ownership, even assuming that this is a Japanese vessel under that theory, it is not within the protection of this treaty.

I invite your Honor's attention again to page 2449 of the same volume of Statutes at Large—volume 46—

THE COURT: What page?

MR. CHICHESTER: Page 2449. At the conclusion of the treaty we find on page 2449, "Exchange of notes". One is from the Japanese Ambassador to the Secretary of State, dated May 31, 1928, and there is a memorandum included with it as an inclosure. The one to which I desire to invite your Honor's attention to is the note of May 31, 1928, from the Secretary of State to the Japanese Ambassador.

THE COURT: Mr. Reporter, read that last statement.

(Thereupon, the Reporter read the last statement of counsel.)

MR. CHICHESTER: And I may say, your Honor, that this treaty was made effectual as of January 16, 1930. This note, your Honor, preceded the execution, final execution of the treaty. The pertinent part is the memorandum included with this last-mentioned note from the Secretary of State to the Japanese Ambassador. It reads, "It is understood—1. That the term 'private vessels', as used in the Convention, signifies all classes of vessels other than those owned or controlled by the Japanese Gov-

ernment and used for Governmental purposes, for the conduct of which the Japanese Government assumes full responsibility." That is the only part of that memorandum which appears to be pertinent to our question here. In view of that explanation—

THE COURT: Just a moment. Will you read again the part that you have quoted?

MR. CHICHESTER: From the treaty or from the memorandum?

THE COURT: From the memo.

MR. CHICHESTER: "It is understood—1. That the term 'private vessels,' as used in the Convention, signifies all classes of vessels other than those owned or controlled by the Japanese Government and used for Governmental purposes, for the conduct of which the Japanese Government assumes full responsibility."

If I may recapitulate, it is my understanding of that—leaving out the Japanese Government vessels, that the term "private vessels," as used in the Convention, signifies all classes of vessels for the conduct of which the Japanese Government assumes full responsibility. The wording "private vessels" is used in Article II. "The Japanese Government agree that they will raise no objection to the boarding of private vessels under the Japanese flag outside the limits of territorial waters by the authorities of the United States"—Now, then, my understanding from the reading of this treaty is that "private vessels"—that term is to be modified by this memorandum; that is, private vessels are those for which the Japanese Government assumes responsibility, and that the private vessels must be under the Japanese flag. Those are two conditions

which must be conceded in favor of the treaty, to its execution, for a vessel seeking its protection. Now, it is our contention that unquestionably there was no flag of any kind on board the "Patricia," nor had she ever displayed a flag, and then it is our further contention that there is no assumption of responsibility on the part of the Empire of Japan for the operations and activities of this vessel. The vessel, according to all of the evidence, was built in the United States, owned by a Japanese in the United States, and from all that we know now, in the case, never was within any port of Japan or within any port of a possession of Japan.

Now, it is my understanding from a reading of this treaty that "private vessels" is to be modified by this memorandum, that is, that the "private vessels" referred to are vessels for which the Japanese Government assumes full responsibility, and, (2), that the private vessels must be under the Japanese flag. Those are two conditions as I construe this treaty which must be precedent to the execution of a treaty in favor of the vessel which seeks it protection. Now, it is our contention that unquestionably there was no flag of any kind aboard the "Patricia", nor had she ever displayed a flag that we know of, and it is our further contention that there is no assumption of responsibility on the part of the Empire of Japan for the operation and activities of this vessel, a vessel, according to all of the evidence, built in the United States, owned by Japanese in the United States, and from all that we know in the case, never within any port in Japan nor within any port of possession of Japan.

I think that description of the vessels to be affected is very important in the construction of this treaty and to show, if it does show, which may be a bit removed, but I think it has some bearing, we have a treaty of 1911 between Japan and the United States which is not on this same subject-matter and I merely refer to it for the purpose of showing the construction of that treaty, or rather, the definition of what they mean by "vessels". It is a treaty referring to commerce and navigation as between the two nations entered into in 1911 for a period of—

THE COURT: Is that of any importance, the duration:

MR. CHICHESTER: No, your Honor, other than this: It ran for a period of years, I think 12 years, from 1911, the extent of this treaty, and it began some 12 years prior to 1911. It is a treaty which, apparently, is renewed every 12 years between the nations respecting commerce and navigation, and I was unable before I came into Court to find the renewal date of 1923, which would be the expiring date of this treaty, bringing it in effect at this time, but at any rate, we have: "Merchant vessels navigating under the flag of the United States or that of Japan and carrying the papers required by their national laws to prove their nationality shall in Japan and in the United States be deemed to be vessels of the United States or of Japan, respectively."

In that treaty, one particular part of it describes vessels to be embraced in the treaty. Now, I think in a like

manner in the treaty under discussion in this case the vessels to be included in that treaty are properly described and with language which is clear, and I think that they include those vessels and those vessels only. I think that they are exclusive in their description. And that the mere fact that a person owns a vessel and happens to be of the nationality of the Japanese Empire though his vessel is not registered under the laws of Japan, does not bring him within the jurisdiction of the laws of Japan of which the treaty is one of their laws. And I have one observation to make which may parallel the observation made by the Court this morning with respect to the activity of one branch of the Government in the handling of this vessel, the registering and the issuance of a number and thereafter regarding it as an alien-owned vessel and regarding it in effect as a foreign vessel. In my opinion, that procedure, that method of handling alien-owned boats, has grown out of the lack of knowledge of the navigation laws on the part of the clerical force which has been given the authority to execute those laws. I have been unable to find any authority for their issuing a number to a vessel owned by an alien. Now, I may be in error on that, because I do not presume to know all the law, but from what I have been able to find, I cannot find any reason why they are permitted under the laws of the United States to issue a number which is, in the case of Stevens vs. the United States, which has been held to be a document in lieu of the license or certifi-

cate of registry or enrollment, and which is in effect an authority for the operation of that boat under the protection of the United States laws. And why the clerical force of the Collector of Customs, or anyone else, should have the authority to issue a number to a boat owned by an alien is something that I don't understand. In my opinion, the laws are not sufficient to encompass the alien-owned boat. And when the Collector of Customs does issue a number to this boat, if in fact it is a foreign boat, I think he exceeds his authority, and as your Honor noted the parallel situation was the testimony of the Japanese Vice-Consul that the customs of the Consulate here might not be in accordance with the laws of Japan, and I take as a parallel situation the customs of our own Collector's office in my opinion are not in accordance with the laws of the United States.

(Argument.)

(Short recess.)

(After recess further argument.)

THE COURT: Then the case will stand submitted.

MR. SCHLEIMER: The record shows that the "Patricia" is on Monday's calendar. I suppose it will not be on now?

THE COURT: No, because it stands submitted.

(Whereupon, at 5:30 o'clock P. M., the hearing in the above matter was adjourned.)

Minute Order, Judge Hollzer's Calendar, March 30, 1933

It appearing that the vessel involved herein was seized at a point between ten and eleven miles from the nearest shore of the United States, and that the maximum speed which said vessel is capable of attaining is and was not exceeding eight miles per hour, and it further appearing that said vessel, at all times has been and still is, owned by a citizen and subject of the Empire of Japan, and it further appearing that said vessel was, and is an undocumented boat, having been neither registered nor licensed nor otherwise documented under the laws of the United States, and it further appearing that the number allotted to said vessel by the Customs Department was given to said boat as an alien vessel, owned and operated by a subject of the Empire of Japan, and that said vessel was subjected to and required to pay "light" taxes at all times since its construction, the Court finds said vessel was seized in contravention of the treaty entered into between the United States and Japan.

IT IS THEREFORE ADJUDGED that the order heretofore made denying the motion of the respondent to quash and dismiss the proceedings herein is vacated, and the libel against said vessel, its equipment and cargo, is dismissed.

Counsel for respondent will prepare and serve a decree in conformity herewith. An exception is allowed the libelant.

(See Frank Cook vs United States of America, decided by the Supreme Court of the United States January 23, 1933)

[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on to be further heard, before the undersigned, without a jury, on March 24, 1933, Mr. John R. Layng, United States Attorney, and Mr. Frank M. Chichester, Assistant United States Attorney, appearing for libelant, and Mr. Max Schleimer appearing for respondent, and additional evidence, both oral and documentary, was introduced, and the Court being fully advised in the premises, and the cause having been submitted to the Court for decision, and the Court having made a minute order on March 30, 1933, directing judgment to be entered in favor of the respondent, the Court now makes its Findings of Fact and Conclusions of Law as follows, to wit:

FINDINGS OF FACT.

I.

It is true that the oil screw vessel known as "Patricia", with a cargo of assorted intoxicating liquors on board, was seized by agents of the United States Coast Guard, Section Base No. 17, on March 23, 1932, on the high seas at a point between ten and eleven miles off the nearest coast of the United States of America.

II

It is true that after the said seizure, the said agents towed the said oil screw vessel "Patricia" to said Base in the Harbor of Los Angeles, State of California.

III

It is true that after the said vessel was at the said Base, in custody under said seizure, the Collector of Customs of the Port of Los Angeles, State of California, District No. 27, adopted the aforesaid seizure made by said agents of the United States Coast Guard, Section Base No. 17.

IV

It is true that thereafter the Collector of Customs of the Port of Los Angeles, State of California, District No. 27, caused the said vessel and cargo to be appraised, and that the said vessel, her engines, tackle, apparel and furniture, etc. was appraised in the sum of $8000.00, and that the said cargo of assorted intoxicating liquors was appraised at a value in the sum of $17,490.00, total, $25,490.00.

V

It is true that thereafter, and on or about the 28th of April, 1932, the United States Attorney for this District, upon the instructions and at the request of said Collector of Customs caused this action to be instituted, and caused the issuance of process under which the United States Marshall arrested and attached said vessel "Patricia" her cargo, engines, tackle, apparel, furniture, etc.

VI

It is true that at the time of the said seizure, the said vessel bore No. 970-A.

VII.

It is true that the said vessel was built in the year of 1923, by citizens of Japan at Terminal Island, in the State of California, and for citizens of Japan.

VIII.

It is true that from the time the said vessel was built up to the time that the claimant Toichi Tomikawa acquired title to her, the said vessel was continuously owned by citizens of Japan.

IX.

It is true that on or about March 15, 1932, Toichi Tomikawa, the claimant, purchased the said vessel, and was the sole, exclusive, and the only lawful owner thereof from and after said date.

X.

It is true that on and prior to March 15, 1932, the said Toichi Tomikawa was, and still is, an alien and a citizen of the Empire of Japan.

XI.

It is true that at the time of the said seizures, the said vessel's measurements being 82 feet length, 18.5 feet breadth, 8.75 feet draft loaded, and equipped with a Fairbanks-Morse Engine 1924, 100 Horse Power; and that the maximum speed which said vessel was capable of attaining was 7.9 nautical miles per hour.

XII.

It is true that at the time of the said seizure, made by the said agents of the United States Coast Guard, Section Base No. 17, there was no other vessel of any nature of description alongside of the said vessel "Pa-

tricia", or within sight of her, and that the said vessel "Patricia" could not traverse in one hour from the place of the seizure to the nearest coast of the United States.

XIII.

It is true that the Collector of Customs of the Port of Los Angeles, State of California, District No. 27, allotted the said vessel No. 970-A and entered her in his books as an alien vessel owned and operated by a subject of the Empire of Japan, and that the said vessel was subjected to, and required to, and did pay "light money" and taxes at all times since the said vessel was built.

XIV.

It is true that the said vessel, at the time and place of the said seizure made by the agents of the United States Coast Guard, Section Base No. 17, did not violate any laws of the United States of America by reason of having on board the cargo of assorted intoxicating liquors.

XV.

It is not true that the said vessel "Patricia", at the time of the said seizures, and prior thereto, or at any time, was an "American" vessel.

XVI.

It is not true that the said vessel, on or about March 23, 1932, violated the provisions of Section 4377 R. S., 46 U. S. C. A. 325, and thereby became forfeited to the United States of America.

XVII.

It is not true that the failure of the master Toichi Tomikawa to produce a manifest at the time of the said seizure violated Section 584 of the Tariff Act of 1930, 19 U. S. C. A. 1584, and thereby became liable to a penalty of $500.00; thereby became liable to a penalty equal to the value of the merchandise seized as the cargo of the said vessel, and thereby became liable to the payment of the said penalties under section 594 of the Tariff Act of 1930, 19 U. S. C. A. 1594.

XVIII.

It is not true that Toichi Tomikawa, the claimant, knowingly and fraudulently used the said number allotted to her, No. 970-A, and the said vessel engaged in trade in violation of Section 4189 R. S., 46 U. S. C. A. 60, and that because thereof she has become forfeited to the United States of America.

XIX.

It is true that the said seizures were made in contravention to and in violation of the convention between the United States and the Empire of Japan, proclaimed January 16, 1930, U. S. Stat. Vol. 46, pp. 2446-2448.

XX.

It is true that the said libelant has failed to prove by credible evidence the allegations of the libel other than those hereinbefore specifically found as true.

CONCLUSIONS OF LAW.

As Conclusions of Law, from the foregoing Findings of Fact, the Court makes the following:

A.

That from the time the said vessel "Patricia" was built, and up to and including the said seizures, she was an alien-owned and American-built vessel.

B.

That by the collection from said vessel of light money and taxes, and by the entries in the books of the Collector of customs of said District of the said vessel Patricia as an alien-*own* Japanese vessel, the libelant well knew at the time of the said seizures, that the said vessel was an alien-owned vessel.

C.

That the said seizures were in contravention to and in violation of the convention between the United States and the Empire of Japan proclaimed January 16, 1930, U. S. Stat. Vol. 46, pp. 2446-2448.

D.

That the said seizures were unlawful, illegal, and in violation of law.

E.

That Toichi Tomikawa, the claimant herein, is entitled to judgment as follows, to wit: That the minute order made herein on October 13, 1932, overruling said claimant's objection to the jurisdiction of the Court, and denying his motion to quash the said seizures and to dismiss this proceeding, and to quash the seizures and all proceedings based thereon, be annulled, vacated and set aside; that each count of the libel herein be dismissed

upon the merits; that Toichi Tomikawa, the claimant herein, is entitled to the return of the said vessel "Patricia" and her cargo, engines, tackle, apparel, furniture, etc., which was on board of the said vessel on March 23, 1932, at the time she was seized by the agents of the United States Coast Guard, Section Base No. 17; that upon the service of a certified copy of the decree to be entered hereon, the Commander, or Commandant of the United States Coast Guard, Section Base No. 17, in the Harbor of Los Angeles, State of California, and the Collector of Customs of the Port of Los Angeles, State of California, District No. 27, upon the service of a certified copy of the decree to be entered hereon, shall deliver to Toichi Tomikawa, the claimant herein, or his lawful and authorized agent, or agents, the said vessel "Patricia" and that she be permitted to be taken to a dry dock for the purpose of examining her as to her sea-worthiness, and for repairs, if necessary; that after such examination and repairs, and upon her arrival at the United States Coast Guard, Section Base No. 17, in the Harbor of Los Angeles, California, the Collector of Customs of the Port of Los Angeles, State of California, District No. 27, shall, at his own cost and expense, immediately return the assorted intoxicating liquors, the cargo which was on board of the said vessel "Patricia" at the time of the said seizure, and shall, at his own cost and expense, place same on board of the said vessel "Patricia" and permit her to proceed on the high seas; that the Commander or Commandant of the United States Coast Guard, Section Base No. 17, in the Harbor of Los Angeles, State of California, shall assign a Coast Guard Cutter as a convoy to accompany the said vessel "Patricia" on her said trip in order to protect her from seizure and to

arrive safely at the point of place where she was seized, namely, at the point between ten and eleven miles southwest true from San Mateo Rocks, off the coast of the State of California, and then permit her to proceed on the high seas wherever she may desire to proceed without hinderance, interference or molestation.

The Court hereby orders and directs that judgment be entered accordingly.

DONE in open Court this 28 day of June, 1933.

Hollzer
U. S. District Judge.

Approved as to form, as provided in Rule 44.

Pierson M. Hall,
United States Attorney,
Frank M. Chichester,
Assistant United States Attorney,
Attorneys for Libelant.

Max Schleimer,
Proctor for Claimand and Respondent.

[Endorsed]: Original No. 5567-H. In the United States District Court in and for the Southern District of California Central Division The United States of America, Libelant, vs. America Oil Screw "Patricia", No. 970-A, etc., Respondent. FINDINGS OF FACT AND CONCLUSIONS OF LAW. Received copy of the within Findings of Fact and Conclusions of Law this 9th day of May, 1933 Frank M Chichester Attorneys for Libelant. Filed Jun 29, 1933 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk Max Schleimer, Att'y for Claimant & Respt., 609-610 Lincoln Bldg., 742 So. Hill St., Los Angeles, Calif. TU 7714.

[Title of Court and Cause.]

DECREE.

This cause came on to be further heard, at this term, and was thereafter argued by counsel; and upon consideration thereof, it is:

ORDERED, ADJUDGED AND DECREED that the minute order made herein on October 13, 1932, overruling the claimant's, Toichi Tomikawa, objection to the jurisdiction of the Court, and denying his motion to quash the seizures herein and to dismiss this proceeding, and to quash the seizures and all proceedings based thereon, be, and the same hereby is, annulled, vacated and set aside; and, it is further

ORDERED, ADJUDGED and DECREED that each count of the libel herein be, and the same hereby is, dismissed upon the merits; and, it is further

ORDERED, ADJUDGED and DECREED that Toichi Tomikawa, the claimant herein, is entitled to the return of the vessel "Patricia" and her cargo, engines, tackle, apparel, furniture, etc., which was on board of the said vessel on March 23, 1932, at the time she was seized by the agents of the United States Coast Guard, Section Base No. 17, and, it is further

ORDERED, ADJUDGED and DECREED that upon the service of a certified copy of this decree, the Commander or Commandant of the United States Coast Guard, Section Base No. 17, in the Harbor of Los Angeles, State of California, and/or U. S. Marshall and the Collector of Customs of the Port of Los Angeles, State of California, District No. 27, shall deliver to Toichi

Tomikawa, the claimant herein, or his lawful and authorized agent, or agents, the said vessel "Patricia", and that she be permitted to be taken to a dry dock for the purpose of examining her as to her sea-worthiness, and for repairs, if necessary; and, it is further

ORDERED, ADJUDGED and DECREED that after such examination and repairs and upon her arrival at the United States Coast Guard, Section Base No. 17, in the Harbor of Los Angeles, California, the Collector of Customs of the port of Los Angeles, State of California, District No. 27, upon the service on him of a certified copy of this decree, shall, at his own cost and expense, immediately return the assorted intoxicating liquors, the cargo which was on board of the said vessel "Patricia" at the time of the said seizure, and shall, at his own cost and expense, place same on board of the said vessel "Patricia", and permit her to proceed on the high seas; and, it is further

ORDERED, ADJUDGED and DECREED that the Commander or Commandant of the United States Coast Guard, Section Base No. 17, in the Harbor of Los Angeles, State of California, shall assign a Coast Guard Cutter as a convoy to accompany the said vessel "Patricia" on her said trip in order to protect her from seizure and to arrive safely at the point or place where she was seized, namely, at the point between ten and eleven miles southwest true from San Mateo Rocks, off of the coast of the State of California, and then permit her to

proceed on the high seas wherever she may desire to proceed, without hinderance, interference, or molestation, and thereafter the said Coast Guard Cutter shall return to its base.

DONE in open Court this 28 day of June, 1933.

Hollzer
U. S. District Judge.

Approved as to form, as provided in Rule 44.

*Pie*rson M. Hall,
United States Attorney,

Frank M. Chichester,
Assistant United States Attorney,
Attorneys for Libelant.

Max Schleimer,
Proctor for Claimant and Respondent.

Decree entered and Recorded June 29, 1933 R. S. Zimmerman, Clerk, By M. R. Winchell, Deputy Clerk.

[Endorsed]: Original No. 5567-H. In the United States District Court in and for the Southern District of California Central Division The United States of America, Libelant, vs. American Oil Screw "Patricia" No. 970-A., etc., Respondent, DECREE. Received copy of the within Decree this 9th day of May 1933 Frank M. Chichester Attorneys for Libelant. Filed Jun 29 1933 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk Dock 7/1/33 M. R. W. Max Schleimer, Att'y for Claimant & Respt., 609-610 Lincoln Bldg., 742 So. Hill St., Los Angeles, Calif. TU 7714.

[Title of Court and Cause.]

MOTION TO VACATE FINAL DECREE AND FINDINGS OF FACT AND CONCLUSIONS OF LAW HEREIN.

COMES NOW the libelant herein, United States of America, by its proctors, Peirson M. Hall, United States Attorney for the Southern District of California, and J. J. Irwin and Ignatius F. Parker, Assistant United States Attorneys for said District, and moves the above entitled Court to vacate the final decree entered herein on June 29, 1933, and to vacate the findings of fact and conclusions of law signed by the Court herein on June 28, 1933, and filed in this matter on June 29, 1933.

The said motion is based upon the following grounds:

I

The evidence herein does not support the said findings of fact and conclusions of law and the said judgment entered herein.

II

The said findings of fact and conclusions of law and said judgment under the facts in evidence herein are contrary to law.

This motion will be based upon the files and records on file in the above entitled case and the evidence introduced

therein and upon the Points and Authorities attached hereto.

Dated July 12, 1933.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney

J. J. Irwin
J. J. IRWIN,
Assistant United States Attorney

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney

Attorneys for Libelant.

[Endorsed]: No. 5567-H District Court of the United States Southern District of California Central Division United States of America, Libelant, vs. American Oil Screw "Patricia", No. 970-A, her engines, tackle, apparel, furniture, etc., Respondent. MOTION TO VACATE FINAL DECREE AND FINDINGS OF FACT AND CONCLUSIONS OF LAW HEREIN; POINTS AND AUTHORITIES Filed Jul 12 1933 R. S. Zimmerman, Clerk By Thomas Madden Deputy Clerk

[Title of Court and Cause.]

ANSWER TO MOTION TO VACATE FINAL DECREE AND FINDINGS OF FACT AND CONCLUSIONS OF LAW.

COMES now Toichi Tomikawa, claimant herein, and the respondent herein, by their proctor, Max Schleimer, and respectfully oppose the libelant's application to vacate the final decree entered herein on June 29, 1933, and to vacate the Findings of Fact and Conclusions of Law, signed by the Court herein on June 28, 1933, and filed in this matter on June 29, 1933, and respectfully submit to this Honorable Court that said application ought not to be granted, because:

(1). Said application, in effect, is for a new trial, and in the absence of a statute or rule, as here, it cannot be maintained.

(2). The Findings of Fact are supported by an overwhelming amount of evidence, both oral and documentary, and the Conclusions of Law are warranted upon the facts found.

(3). The findings of Fact and Conclusions of Law and the Judgment are not contrary to law.

Said answer to the said motion is based upon the Minute Orders of March 30, 1933, and June 28, 1933, and the oral evidence adduced upon the trial of this matter, and upon the documentary evidence introduced therein.

Dated, July 17, 1933.

Max Schleimer
Max Schleimer,
Att'y for Claimant & Resp't.,
609-610 Lincoln Bldg.,
742 So. Hill St.,
Los Angeles, Calif. TU 7714.

At a stated term, to wit: The February Term, A. D. 1933, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 21st day of August in the year of our Lord one thousand nine hundred and thirty-three.

Present:

The Honorable H. A. HOLLZER, District Judge.

It appearing that there is pending herein a motion to vacate the decree herein, and it further appearing that the time to appeal from said decree will likely expire before a decision may be rendered upon said motion and good cause appearing therefor, it is ordered that the findings, conclusions and decree entered herein be and the same are vacated, and the cause continued for further proceedings to the second day of October, 1933, at 2 PM.

At a stated term, to wit: The September Term, A. D. 1933, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 15th day of September in the year of our Lord one thousand nine hundred and thirty-three.

Present:

The Honorable HARRY A. HOLLZER, District Judge.

The order heretofore made herein under date of August 21, 1933, is modified in the following respect, to-wit: Said cause is continued for further argument on the merits, with particular reference to the question whether the vessel "Patricia" under libel herein is entitled to the benefits of the treaty with Japan bearing date of March 31, 1928.

At a stated term, to wit: The February Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday the 6th day of April in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable Harry A. Hollzer, District Judge.

It appearing that the respondent vessel "Patricia", was built in the United States and within this District; that at all the times mentioned in the amended libel, the respondent vessel was owned by the claimant, one T. Tomikawa, a subject of the Empire of Japan; that at the time of, and several years next preceeding, the seizure of the respondent vessel, said claimant maintained a home and was domiciled in the United States and in this district; that on or about March 18, 1932, on application of said claimant, there was awarded to respondent vessel by the United States Collector of Customs for District No. 27, the number 970-A; that at all times herein mentioned, respondent vessel carried on its stern as the name of the home port of said vessel, the words "Los Angeles"; that respondent vessel was never registered nor licensed nor

documented by the Japanese Government; that at the time of the loading, search and seizure of respondent vessel, it was not flying the Japanese flag, and was not entitled to fly the same; that on or about March 23, 1932, an officer of the United States Coast Guard boarded respondent vessel while respondent vessel was on the high seas, travelling toward the coast of the United States, and within four leagues of said coast, to-wit: at a point between 10 and 11 miles off the nearest coast of the Southern portion of the State of California; that at the time said officer of the Coast Guard boarded respondent vessel, and prior to the search and seizure thereof, said officer requested the person in charge of respondent vessel for the manifest and for the registration papers and was informed that neither any manifest nor registration paper was on board; that upon the failure to produce the manifest said officer of the Coast Guard seized and searched respondent vessel and found on board thereof, a cargo of assorted intoxicating liquors, the appraised value of which cargo amounts to the sum of $17,490.00; that at the time of said seizure of respondent vessel, the master thereof, in violation of Section 584 of the Tariff Act of 1930 (19 USCA 1584) had failed and refused to produce the manifest in response to the demand of said officer of the Coast Guard, and by reason thereof, the master of respondent vessel has become liable to a penalty of $500.00, and to a further

penalty to the value of the cargo of respondent vessel, and likewise, respondent vessel had become liable for the payment of said penalties; that at the time of the boarding, search and seizure of respondent vessel, the number 970-A theretofore granted to it was knowingly and fraudulently used for respondent vessel when it was not entitled to the benefit thereof, and at the time last mentioned, respondent vessel was illegally engaged in trade and by reason of such illegal use, respondent vessel, her tackle, apparel and furniture became liable to forfeiture;

IT IS ORDERED that Counts 2 and 3 of the amended libel be sustained, and that a decree be entered in conformity herewith;

IT IS FURTHER ORDERED that Count 1 of the amended libel be dismissed. An exception is allowed to respondent.

Findings and Decree shall be prepared in conformity herewith.

(Section 584, Tariff Act, 1930, 19 USCA 1584; Section 594 of same Act, 19 USCA, 1594; Section 4189, R. S. 46 USCA 60; US vs Davidson, 50 Fed (2d) 517, 520; Malagash Fish Co. vs U. S., 63 Fed (2d) 311, 312; Stephens vs US, 30 Fed. (2d) 286; U. S. vs Coppolo, 2 Fed. Supp, 115, 116 (second column); Arch vs US, 13 Fed (2d) 382, 384 and cases therein cited.

LOS ANGELES, CALIFORNIA.

MONDAY, OCTOBER 2, 1933. 3:15 O'CLOCK P. M.

. . . o0o . . .

THE CLERK: No. 5567-H, U. S. vs. "Patricia."

MR SCHLEIMER: Ready.

MR PARKER: Ready.

THE COURT: This matter went over—let's see—have you got the file there so we can get the wording of the Court's order. (Examining file.)

The Court made an order herein under date of September 15th, as follows: "The order heretofore made herein under date of August 21, 1933, modified in the following respect, to-wit: Said cause is continued for further proceeding in order that the Court may hear further argument on the merits with particular reference to the question whether the vessel 'Patricia' under libel herein is entitled to the benefits of the treaty with Japan, and bearing date of March 31, 1928."

We think counsel appreciates the purport of that order. It was the Court's view that but for the treaty the Government was entitled to proceed as it had done in this cause, that the vessel would avoid the consequences of seizure under the conditions under which seizure took place—or put it this way: That. ordinarily, a vessel captured by the coast guard, under the conditions which existed here with respect to the vessel "Patricia" would be subject to seizure and forfeiture.

However, it was our thought that by virtue of the decision of the United States Supreme Court in the so-called Cook case that this vessel came within the accepted class defined by that decision.

Further reflection, however, has raised the question that the United States Supreme Court, in the Cook case, was interpreting and applying the treaty, in that instance a treaty with Great Britain, the language of which, however, is substantially the same as the language of the treaty with Japan, and the purpose of each of these two treaties was identical.

The Government has advanced the contention that except for such a treaty that it is entitled to proceed in the manner in which that cause has been prosecuted, that the labor is upon the party claiming the benefits of the exception contemplated by the treaty. We think there is considerable force in the Government's contention, and that it is incumbent upon the respondent to show that under the record, as we have it here, this respondent is entitled to the benefits of the treaty made with Japan, and thus be excepted from or relieved of the ordinary consequences of the state of fact such as we found to exist here.

MR SCHLEIMER: May it please the Court, there are two preliminary matters which I respectfully submit should be taken up in advance for disposition: (1) One of the matters is that the order which your Honor stated a minute ago, dated August 21, 1933, was made on the Court's own motion and in the absence of the claimant or his counsel. Therefore, neither of them had an opportunity to take an exception to the ruling, nor did the Court grant the claimant an exception, which is customary to grant when an order is made in the absence of the claimant or counsel. I, therefore, at this time, respectfully

ask—or respectfully take an exception to the ruling, decision and the order made on August 21, 1933, and as modified by your Honor on September 15, 1933. And I also ask that your Honor direct that the exceptions be entered in the minutes of this court nunc pro tunc as of said dates and at the time the said orders were made, in order that the respondent's and claimant's rights be properly protected.

THE COURT: In other words, that an exception be noted as to the respondent both with respect to the order of August 21st and also the order of September 15th?

MR. SCHLEIMER: Yes, your Honor.

THE COURT: That strikes us as merely preserving the respondent's rights, to be heard and to review the Court's ruling.

MR. PARKER: I think that it is so intended.

I would say this, however, that on September 9th counsel filed a written exception in this case to the order of August 21st; that afterwards counsel conferred with me with reference to a modification of the order that was entered on September 15th. Counsel had plenty of opportunity heretofore to enter any exception on the orders, and did as to the first order.

We have no objection to the other.

THE COURT: It occurs that whatever rights the respondent may have to review, the rulings of this court ought to be preserved. Let the record show that exception is allowed the respondent to the order of August 21, 1933, as of that date, and also to the order of September 15, 1933, as of that date.

MR. SCHLEIMER: Now, may it please the Court, at this time the respondent and claimant moves to set aside both of these orders on the ground that it appears from

the record and the file certain matters to which I will presently call the Court's specific attention to. The grounds upon which the motion is now made are as follows:

1. That this Honorable Court inadvertently made the orders, dated respectively August 21, 1933 and September 15, 1933.

THE COURT (Interrupting): What was the first ground?

MR SCHLEIMER: That this Honorable Court inadvertently made the said two orders.

2. That this Honorable Court prematurely made said orders.

3. That this Honorable Court made said orders, with due respect to this Honorable Court, without authority in law and contrary to precedence.

4. That this Honorable Court has already passed upon the precise questions several times before the decree that was entered in this case was made and entered.

5. That the judgment in the case entitled, "In the District Court of the United States, In and For the Southern District of California, Central Division. United States of America, plaintiff, vs. Toichi Tomikawa, et al., defendants, No. 10898-H," is in effect an acquittal of the defendant who is the respondent and claimant in this cause, of the same charges involved in this cause, and is therefore res adjudicata in this cause.

6. That this Honorable Court will take judicial notice of the said judgment and the records that are in the file in the case.

7. That the said orders deprive the respondent and claimant of the benefits of the decree filed in this cause,

with due respect to this Honorable Court, without any legal reason therefor.

THE COURT: Do we understand that you have all those things in writing?

MR SCHLEIMER: I have them in sort of a memorandum for my reference. I want to state the precise grounds.

THE COURT: Don't you think it would help both counsel and the Court to have a copy of that rather than ask us to make notes?

MR SCHLEIMER: I have sufficient copies prepared but they were typed just a few minutes before I came here and I didn't have time to go over them carefully. They are subject to any errors or corrections. I hand your Honor a copy and also counsel a copy.

I believe I just got through with the seventh ground, and I have one more.

8. The eighth ground is that the orders deprive the respondent and claimant in this cause of the statutory right of taking an appeal from the decree, and thus deprived them of a substantial legal right, with due respect to this Honorable Court, with no legal cause.

May it please the Court, in order that this Honorable Court may properly pass upon the grounds which I briefly stated, I desire to point out some of the matters which appear in the records and in the file in this cause which, in my humble opinion, are decisive.

These matters are as follows: The court reporter's transcript of the hearing of February 27, 1933, shows that this Honorable Court called counsel's attention to a case decided by the United States Supreme Court. At this time the Court did not mention the title of the case,

but presumably it referred to the case of Cook vs. the United States.

This Honorable Court then stated that there were two main questions in this case, namely: (1) If the vessel "Patricia" be regarded as a foreign vessel, and (2) Was she unlawfully seized because the seizure was made at a point or place more than one hour's sailing nearest the land. This Honorable Court desired further argument thereon.

The court reporter's transcript of the hearing of March 13, 1933 shows that counsel for the libelant made an application in open court to reopen this cause for further proof on those questions, stated by this Honorable Court. I opposed that application on behalf of the respondent and claimant because it was not based on a written application.

The file also shows that thereafter the libelant made a written application in which he stated that he desired to introduce additional evidence in order that the Court may pass upon these questions; that the said additional evidence was to have the Consul of Japan, or his representative, testify as to the laws of Japan, bearing on the said questions.

This Honorable Court, on March 27, 1933, on or about that date—I don't remember exactly the date now—this Honorable Court made an order granting the said application of the libelant.

On March 24, 1933, the hearing was had for that purpose.

THE COURT: Now, I am just wondering, aren't the dates a little mixed? You have the hearing before the order granting it.

MR SCHLEIMER: I said, your Honor, I didn't recall the exact date, but the record will show that. I said that.

On March 24, 1933, a hearing was had for that purpose. The hearing was commenced at 10 o'clock in the morning and lasted until 5:30, as the reporter's transcript shows.

The court reporter's transcript of that hearing consists of 106 pages of testimony and argument, and that at the conclusion thereof the cause was again submitted to this Honorable Court for decision.

On March 30, 1933, this Honorable Court made a minute order in which it directed that judgment be entered in favor of the respondent and claimant, and which stated the reasons therefor and cited the case of Cook vs. the United States, decided January 23, 1933, as authority.

Since then several hearing were had on briefs in which counsel for the libelant argued substantially the same grounds and they were overruled.

May it please the Court, these facts in this cause which I just pointed out show conclusively that the time to appeal did not expire until September 29, 1933; and that when this Honorable Court stated in a minute order of August 21, 1933 that the time to appeal would expire before a decision could have been made, it was obviously an inadvertence, that the point upon which this Honorable Court desires to hear further argument was already passed upon several times by this Honorable Court in different forms before the final decree was entered.

May it please the Court, at this time if you desire any authority for my proposition, I am ready to submit the authority. I rely upon the case of Thomassen vs. Whit-

well, reported in 23, Federal Case No. 13,930; also reported in 9 Ben. page 458.

(Argument.)

MR. SCHLEIMER: I have no objection to that, your Honor.

MR. PARKER: Did your Honor make any disposition of the motion to vacate the minute orders?

THE COURT: We will take that under consideration along with these points on the merits.

THE COURT: The question is now within what time the Government counsel will file the memorandum.

MR PARKER: So we can get a brief before the Court?

THE COURT: Yes.

MR SCHLEIMER: May I have the opportunity to answer? He has made a statement in court which I don't agree with.

MR PARKER: We would like a week or ten days, ten days preferably, your Honor.

THE COURT: Ten days. Then the respondent may have until the 16th to file any additional memorandum, by way of reply only.

MR PARKER: Thank you.

MR SCHLEIMER: That means that I could answer his motion—his objection as well as his memorandum?

THE COURT: Yes.

MR SCHLEIMER: Thank you.

And does the matter stand submitted or will it be up on the calendar again?

THE COURT: No, it will be marked for submission on the 16th, at 2:00 p. m. For submission only. It will be carried on the calendar for that purpose.

MR SCHLEIMER: It will not necessitate our presence?

THE COURT: No.

(Whereupon the taking of argument was concluded.)

. . . o0o . . .

LOS ANGELES, CALIFORNIA
MONDAY, OCTOBER 16, 1933 2:30 O'CLOCK P. M.

(Argument, on motions.)

THE COURT: And respecting those two matters, we are contemplating hearing witnesses.

So far as the motion to require Claimant to give additional security for costs is concerned, it occurs to us that since no additional costs are being incurred, that is, none has been since June of this year, pending the decision of the court on the matters that are now being submitted, that motion should be denied, without prejudice, to which renewal may be made at a later date.

THE COURT: We will keep all three motions open. The matter will go over to October 25th, at 2:00 p. m.

(Whereupon the taking of argument in the above entitled case was concluded at 3:40 p. m.)

LOS ANGELES, CALIFORNIA
WEDNESDAY, OCTOBER 24, 1933
3:15 O'CLOCK P. M.

. . . o0o . . .

. . . . . .

THE COURT: We have on the calendar this afternoon the three motions, and we believe the Government contemplated offering evidence in support of the motions.

(Whereupon the taking of argument in the above entitled case was concluded at 5:05 p. m.)

[Title of Court and Cause.]

RESPONDENT'S AND CLAIMANT'S REQUEST TO FIND.

To the

Hon. Harry A. Hollzer,
United States District Court Judge in and for the Southern District of California, Central Division.

The respondent and claimant herein respectfully asks Your Honor to make the Findings of Fact and Conclusions of Law herein as proposed by them, and hereto annexed.

Dated, May 15, 1934.

Max Schleimer
Max Schleimer,
Att'y for Rspt & Claimant,

718-720 Grant Bldg.,
355 So. Broadway,
Los Angeles, Calif. TU 7714.

[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on to be further heard at this term, and was argued by counsel; and upon consideration thereof, the Court now makes its Findings of Fact and Conclusions of Law as follows, viz:

FINDINGS OF FACT.

1.

It is true that in the year of 1924, K. Uyeji and O. Uyemoto, citizens of the Empire of Japan built a vessel at the Terminal Island, California, and named it "Patricia".

2.

It is true that on July 12, 1924, the then Collector of Customs of the port of Los Angeles, California, District No. 27, entered in his book known as "American built and alien owned vessels", that the said vessel was built and owned by the said K. Uyeji and O. Uyemoto, citizens of the Empire of Japan, and thereupon allotted and gave the said vessel the number of "970-A". Thereupon they painted on the stern of the said vessel the said number and the letters "L. A."

3.

It is true that on July 11, 1930, the said K. Uyeji and O. Uyemoto sold the said vessel to George Kioo Agawa,

a citizen of the Empire of Japan, and the then Collector of Customs of the Port of Los Angeles, California, District No. 27, entered the said sale in his said book, and thereupon allotted and gave the said vessel the said number of "970-A".

4.

It is true that on March 13, 1932, the said George Kioo Agawa sold the said vessel to Toichi Tomikawa, a citizen of the Empire of Japan, and the then Collector of Customs of the Port of Los Angeles, California, District No. 27, entered the said sale in his said book, and thereupon allotted and gave the said vessel the said number of "970-A".

5.

It is true that the measurements of said vessel are 82 feet length, 18.5 feet breadth, 8.75 feet draft loaded, and at the time of the seizure hereinafter stated, she was equipped with a Fairbanks-Morse Engine of 1924, of 100 horse power.

6.

It is true that the maximum speed which the said vessel could sail or traverse under her own power, at the time of the seizure hereinafter stated, was 7.9 nautical miles per hour.

7.

It is true that between about July 12, 1924, and March 18, 1932, the said owners of said vessel paid "light money" to the respective Collectors of Customs of the Port of Los Angeles, California, District No. 27, on the basis of 43 tons net, 50 cents per ton, the sum of $107.50, be-

sides $1.00 for 5 certificates issued by them of such payment, at 20 cents each, making a total of $108.50 annually during said period. The said payments were demanded by the said Collectors of Customs and paid by said owners respectively pursuant to the provisions of Section 4225 of the Revised Statutes of the United States, now known as 46 USCA 128.

8.

It is true that on March 23, 1932, the revenue cutter known as CG-259 of the United States Coast Guard, section base No. 17, in charge of Frederick J. Dwight, Chief Boatswain's Mate, was on the high seas of the Pacific Ocean, in search of a reported capsized vessel, and sighted the said vessel "Patricia", and proceeded towards her. That when he overtook her, he came alongside of her and the said Chief Boatswain's Mate noticed that she was loaded below her water mark, and he ordered said vessel to stop. When she did so, he then placed a seaman first class on board of the said vessel "Patricia", and later he went on board her, without a search warrant or other process issued by a court of competent jurisdiction. That after they were on board her, he opened her hatchways and found that she was loaded with sacks containing spirituous liquors. Thereupon he arrested Toichi Tomikawa, her master, the claimant herein, and her crew, and seized the said vessel "Patricia", her cargo, engines, tackle, apparel, furniture, and everything that was on board her at that time.

9.

It is true that at the time the said revenue cutter came alongside of the said vessel "Patricia", she bore on her stern the number "970-A" and the letters "L. A."

10.

It is true that the place of said seizure of the said vessel "Patricia" was between 10 and 11 miles southeast true from San Mateo Rock of San Juan Point, California.

11.

It is true that the place of said seizure was ascertained by dead reckoning running from the position where the said revenue cutter started from the Point of San Clemente Island, California, in search of the reported capsized vessel.

12.

It is true that at the place where, and at the time when, the said seizure was made of the said vessel "Patricia", there was no vessel or vessels near her, or anywhere in sight of her.

13.

It is true that the said vessel "Patricia" could not sail under her own power within one hour from said place of seizure to San Mateo Rock of San Juan Point, California, which was the nearest point of land of the United States.

14.

It is true that after the said vessel "Patricia" was seized, the said revenue cutter CG-259 of the United States Coast Guard, section base No. 17, in charge of said Frederick J. Dwight, Chief Boatswain's Mate, towed her to section base No. 17, San Pedro, California, in the Harbor of Los Angeles, California.

15.

It is true that after the said vessel "Patricia" was at the said section base No. 17, San Pedro, California, in

the Harbor of Los Angeles, California, in the custody of the United States Coast Guard under said seizure, the then Collector of Customs of the Port of Los Angeles, California, District No. 27, adopted the said seizure made.

16.

It is true that at the time the then Collector of Customs of the Port of Los Angeles, California, District No. 27, adopted the said seizure, he took into his possession and custody the said vessel "Patricia", her cargo, engines, tackle, apparel, furniture, and everything that was on board her. The said cargo consisted of 112 empty oil drums and 1749 sacks each containing assorted spirituous liquors.

17.

It is true that after the then Collector of Customs of the Port of Los Angeles, California, District No. 27, had taken possession and custody of the said vessel "Patricia" and her cargo, engines, tackle, apparel, furniture, and everything that was on board her, he caused its value to be appraised. The said vessel "Patricia" was appraised in the sum of $8000.00, and the cargo of assorted spirituous *liquirs* in the sum of $17,490.00.

18.

It is true that thereafter, and on or about April 28, 1932, the then United States *Atorney* for the Southern District of California, Central Division, upon the request and instructions of the then Collector of Customs of the Port of Los Angeles, California, District No. 27, instituted this libel to condemn and forfeit the said vessel "Patricia" and her said cargo, engines, tackle, apparel,

furniture, and everything that was on board her, and caused the issuance of process out of this Court to arrest and attach same, and that the same was arrested and attached by the then United States Marshal in and for the Southern District of California, Central Division.

19.

It is true that at the time and place where the said vessel "Patricia" was seized on the high seas, there was a fog, and that the said vessel was drifting in order to enable its master to ascertain his whereabouts and to get his bearings.

20.

It is true that at the time and place where the said vessel "Patricia" was seized on the high seas, the said Frederick J. Dwight, the Chief Boatswain's Mate of the revenue cutter CG-259 of the United States Coast Guard, base No. 17, or any member of its crew, did not have a search warrant or any other process authorizing him, or them, to go on board of said vessel "Patricia" to search her, or for any other purpose.

21.

It is true that the said Toichi Tomikawa, the master of the said vessel "Patricia", the claimant herein, was, at all times hereinbefore and hereinafter stated, and is, an alien and a citizen of the Empire of Japan, and is incapable of becoming a citizen of the United States under the provisions of Section 2169 of the Revised Statutes of the United States, now known as 8 USCA 359.

22.

It is true that at all the times hereinbefore and hereinafter stated, the domicile of the said Toichi Tomikawa,

the claimant herein, was, and is, in the City of Nishinomiya in the Province of Hyogo, Japan, where he domiciles with his wife and son, and temporarily resided, or sojourned, while in the United States, at Terminal Island, California.

23.

It is true that the Treaty between the United States and Japan, proclaimed April 5, 1911, 37 U. S. Stat. 1504-1509, Article IV among other things, provides that the citizens or subjects of Japan shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the United States; that Article XIII, Part One, among other things, provides that the citizens or subjects of Japan shall enjoy the most-favored nation treatment in the territories of the United States.

24.

It is true that the Convention between the United States and Japan, proclaimed January 16, 1930, 46 U. S. Stat. 2446-2448, Article I, among other things, provides that it was the firm intention of the High Contracting Parties to uphold the principle that 3 marine miles extending from the coast line outwards and measured from the low-water mark constitutes the proper limits of the territorial waters of the United States. Article II, among other things, empowered the government of the United States to board private vessels under the Japanese flag outside the said limits of territorial waters for the purpose of ascertaining whether the vessel, or those on board, are endeavoring to import alcoholic beverage into the United States, its territories or possessions, in violation

of its laws, providing such vessel, or vessels, under its own power, can traverse in one hour from the place of such search to the nearest point of land of the United States.

25.

It is true that the said seizure of the said vessel "Patricia" took place on the high seas of the Pacific Ocean outside of 3 marine miles, extending from the coast line outwards and measured from the low-water mark, the limits of territorial waters as agreed upon by said Convention.

26.

It is true that the then Collector of Customs of the Port of Los Angeles, California, District No. 27, had no power, authority or jurisdiction to allot and give the vessel "Patricia" the number "970-A", and that the allotment and giving of said number did not attach to her the same dignity as would have been the case if her owner had been a citizen of the United States.

27.

It is true that the respondent and Toichi Tomikawa, the claimant herein, in due time appeared specially in this libel and made an application to set aside the said seizure, and to vacate and set aside all proceedings based thereon upon the ground, among others, that the said seizure was illegal and unlawful and thereby the Court did not acquire jurisdiction in the premises, for the reason that the ownership of the said vessel determined her nationality, and her owner being a citizen of the Empire of Japan, the nationality of the said vessel was deemed as that of

Japan, and that under said Treaty and Convention the boarding her and seizure was without authority in law.

28.

It is true that the issues raised on said application were duly tried in open court, and the witnesses called by the respective parties herein were duly examined and cross-examined by their respective counsel, and that such proceedings were had thereon that resulted in the making and filing of a minute order overruling said objection.

29.

It is true that on May 4, 1932, the Grand Jury of this Court filed an indictment against the said Toichi Tomikawa, the master of said vessel "Patricia", the claimant herein, and his crew, which indictment is known as No. 10,898-H-CR. That thereafter they appeared specially in said criminal action, and objected to the jurisdiction of this Court, and moved this Court to quash and set aside the said indictment upon the ground, among others, that their arrest at the place aforesaid was illegal, unlawful, and in violation of the said Convention for the reasons, among others, stated in paragraph "27" hereof; that such proceedings were thereafter had that resulted in the making and entry of a minute order denying said application on May 20, 1932; that thereafter the said Toichi Tomikawa, the claimant herein, one of the defendants in said criminal action, duly moved this Court, upon the testimony and proceedings had herein, for a rehearing of said application to quash and set aside the said indictment upon the ground, among others, that said arrest at the said place was illegal, unlawful, and in violation of the said Convention; that such proceedings were duly had upon

said application that resulted in the making and entry of a minute order on April 24, 1933 and judgment was entered on June 20, 1933, quashing and dismissing the indictment in said criminal action; that the time to appeal therefrom has long ago expired, and that no appeal was taken from said order and judgment by the libelant, the plaintiff in said criminal action, and that said judgment is in all respects final and conclusive.

30.

It is true that the said Toichi Tomikawa, the master of the said vessel "Patricia", the claimant herein, who was one of the defendants in the said criminal action, duly requested the Court in this action to take judicial notice of the minute order and judgment made and entered in the said criminal action, and offered to introduce same in evidence in this action, and urged, among other things, that the said minute order and judgment made and entered in said criminal action was a bar in this action against the libelant herein on the issue that the said seizure of the said vessel "Patricia", at the place aforesaid, was illegal, unlawful and in violation of said Convention.

31.

It is true that thereafter such proceedings were duly had in this action that resulted in the making and entry of Findings of Fact and Conclusions of Law and a Decree thereon on or about June 28, 1933, adjudging, among other things, that the libel herein be dismissed upon the merits, and that the said Toichi Tomikawa, the claimant herein, was entitled to the return of the said vessel "Patricia", her cargo, engines, tackle, apparel, furniture,

and everything which was on board her on March 23, 1932, at the time she was seized as hereinbefore stated.

32.

It is true that thereafter this Court, upon the application of the libelant, made and entered herein a minute order on August 21, 1933, as modified by the minute order made and entered herein on September 15, 1933, vacating the said Findings of Fact and Conclusions of Law and Decree, and continued this cause for further hearing on the merits in order that the Court might hear further argument with particular reference to the question whether the vessel "Patricia" under libel herein is entitled to the benefits of the said Convention, in order to stop tolling the time to appeal before this Court could consider that question.

33.

It is true that thereafter, and on January 29, 1934, and while this Court had under consideration the question referred to in paragraph "32" hereof, said Toichi Tomikawa, the claimant herein, duly moved the Court to dismiss the libel upon the ground, among others, that on December 5, 1933, the 21st Amendment to the Constitution of the United States was duly proclaimed as ratified, which repealed the 18th Amendment to the Constitution of the United States, and that by reason thereof the libel abated and that the jurisdiction of this Court was arrested except to enter an order dismissing the libel with direction to return to the said claimant the said vessel, cargo, engines, tackle, apparel, furniture, and everything that was on board her which was seized, as hereinbefore stated.

CONCLUSIONS OF LAW

As Conclusions of Law from the foregoing Findings of Fact, the Court concludes as follows:

A.

That when the vessel "Patricia" was built her nationality was that of Japan.

B.

That by purchasing the vessel, the said Toichi Tomikawa, the claimant herein, became her sole and exclusive owner.

C.

That Toichi Tomikawa, the claimant herein was, and is, a citizen of the Empire of Japan.

D.

That when Toichi Tomikawa, the claimant herein, became the owner of the said vessel "Patricia", her nationality was that of her said owner.

E.

That the acts and conduct of the said Collectors of Customs in entering said vessel in their books as an American built and alien Japanese owned vessel precludes the libelant herein from disputing that fact.

F.

That the acts and conduct of the said Collectors of Customs in demanding and receiving annually "light

money" of the owners of said vessel during said period precludes the libelant herein from disputing the fact that her nationality is Japanese.

G.

That the statute which authorizes the giving of a number to a vessel contemplated and intended to apply to vessels owned exclusively by citizens of the United States, and not to an American built and alien Japanese owned vessel.

H.

That the Collectors of Customs had no right or authority to give said vessel the number of "970-A".

I.

That the giving of said number to said vessel by the Collectors of Customs did not attach any dignity to her, nor convert her into a vessel of the United States.

J.

That the number "970-A" and the letters "L. A." painted or appearing on the stern of said vessel at the time she was seized, as aforesaid, did not attach any dignity to her, nor signify that she was a vessel of the United States as contemplated by law.

K.

That the domicile of Toichi Tomikawa, the claimant herein was, and is, in the City of Nishinomiya in the Province of Hyogo, Japan, and was not changed by his residence within the United States.

L.

That the residence within the United States of Toichi Tomikawa, the claimant herein, is deemed temporary, and not permanent.

M.

That the fact that the said vessel appeared to be loaded below her water mark did not empower or authorize the said Chief Boatswain's Mate of the said revenue cutter to send one of his crew on board her, and himself to go on board her, without a search warrant or other process issued by a Court of competent jurisdiction.

N.

That the acts of the said Chief Boatswain's Mate and a member of his crew going on board of said vessel, and opening her hatchways and searching for spirituous liquor without a search warrant, was a violation of the 4th and 5th Amendments to the Constitution of the United States.

O.

That the said acts of the said Chief Boatswain's Mate and a member of his crew in searching the said vessel "Patricia" without a search warrant, and then seizing her, was null and void, illegal, and unlawful.

P.

That the said search and seizure of the said vessel "Patricia" on the high seas, outside of 3 marine miles from the coast of the United States, constituted a viola-

tion of Article I of the said Convention proclaimed January 16, 1930, 46 U. S. Stat. pages 2446-2448.

Q.

That the said search and seizure of the said vessel "Patricia" on the high seas, constituted a violation of Article II of the said Convention proclaimed January 16, 1930, 46 U. S. Stat. pages 2446-2448, for the reason that the said vessel was incapable of sailing, under her own power, within one hour from the said place of seizure to the nearest point of land of the United States.

R.

That the flying of a flag is merely notice to which nationality the vessel belongs, but is not evidence of that fact.

S.

That the failure of the said vessel "Patricia" to fly the Japanese flag at the time of her said seizure, did not authorize the boarding her for the said purpose, nor justify her said seizure.

T.

That the nationality of the owner of the said vessel "Patricia", and not the flying of a flag on her mast, determines her nationality.

U.

That all proceedings based on said search and seizure are null and void, contrary to law, and are of no legal force and effect.

V.

That the adoption of the said seizure by the said Collector of Customs is null and void, and of no legal force and effect.

W.

That all proceedings based upon the adoption of said seizure by the said Collector of Customs are null and void, and of no legal force and effect.

X.

That the said order and judgment in the said criminal action precludes the libelant herein from disputing the nationality of the said vessel as being a Japanese vessel.

Y.

That the said Toichi Tomikawa, the master of the said vessel "Patricia", did not violate any statute or law of the United States which subjected him to the payment of a penalty.

Z.

That the said Toichi Tomikawa, the master of the said vessel "Patricia", at the time of said seizure, did not violate any statute or law of the United States which subjected him to the payment of a penalty.

AA.

That the said vessel "Patricia", did not violate any statute or law of the United States which subjected her to the payment of a penalty, or condemnation or forfeiture.

BB.

That the said vessel "Patricia, at the time of said seizure, did not violate any statute or law of the United States, which subjected her to the payment of a penalty, or condemnation or forfeiture.

CC.

That upon the adoption of the 21st Amendment to the Constitution of the United States, which repealed the 18th Amendment thereof, this action abated, and thereby arrested the jurisdiction of this Court in the premises, except to order this action to be dismissed with direction to return to Toichi Tomikawa, the claimant herein, the said vessel "Patricia", her cargo, engines, tackle, apparel, furniture, and everything that was on board her at the time of the said seizure.

THE COURT, THEREFORE, ORDERS AND DIRECTS that this action be dismissed upon the merits, and that the said Toichi Tomikawa, the claimant herein, is entitled to the return of the said vessel "Patricia", her cargo, engines, tackle, apparel, furniture, and everything that was on board her at the time of said seizure, and that a decree be entered herein in favor of the said claimant, Toichi Tomikawa, and against the said libelant, the United States of America, accordingly, with costs to be taxed by the Clerk of this Court and inserted in the Decree.

The foregoing request and the foregoing proposed findings were submitted to the Hon. Harry A. Hollzer on May 16, 1934. The following order was made thereon, to wit:

The foregoing requests to find are each and all denied, except to the extent that the same are already incorporated in the findings and conclusions signed and filed under date of August 9, 1934. An exception is allowed to *to* Respondent and Claimant.

August 10-1934.

Hollzer
Judge.

[Endorsed]: Original No. 5567-H In the United States District Court in and for the Southern District of California Central Division United States of America, Libelant, vs. American Oil Screw "Patricia" No. 970-A, etc., Respondent. RESPONDENT'S AND CLAIMANT'S REQUEST TO FIND, AND FINDINGS OF FACT AND CONCLUSIONS OF LAW. Received copy of the within Request to Find and Findings of Fact and Conclusions of Law, etc., this 16th day of May, 1934. Peirson M. Hall DH Attorneys for Libelant. Filed Aug 10 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk Max Schleimer, Att'y for Rspt & Claimant, 718-720 Grant Bldg., 355 So. Broadway, Los Angeles, Calif. TU 7714.

At a stated term ,to wit: The February Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 2nd day of August in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable Harry A. Hollzer, District Judge.

It appearing that the question has been raised as to whether the evidence shows:

That after the vessel involved herein had been seized and had arrived at the coast guard base, the U. S. Collector of Customs of the Port of Los Angeles adopted the seizure made by the officers of the Coast Guard, under Customs Seizure 11800 as to said vessel, her engines, tackle, apparel, furniture, etc., and as Customs Seizure 11,799 covering the cargo on said vessel.

That said Collector of Customs caused said vessel and cargo to be appraised and said vessel, her engines, tackle, apparel, furniture, etc, were *apparised* as having a value of $8000 and said cargo was appraised under Section 607 of the Tariff Act of 1930 for the purpose of forfeiture proceedings as having a value not exceeding $1000 and said cargo was appraised for the purpose of a basis of penalty against the master of the vessel under Sections

584 and 595 of said Act as having a penalty value of $17,490.

That said Collector of Customs requested the U. S. Attorney for the Southern District of California to institute libel proceedings against said vessel, her engines, etc., for a violation of the customs and navigation laws of the United States.

That said Collector of Customs proceeded with the disposition of said cargo by advertising, etc; that no claim was filed with said Collector of Customs; that the latter disposed of the cargo of intoxicating liquors by destruction, except that 5 cases were retained for use as evidence.

That the U. S. Marshal for the Southern District of California arrested and attached said vessel, her engines, etc., and filed in this Court his return thereof, and that said Marshal did not arrest or attach the cargo of said vessel.

That the claimant never filed any claim for said cargo. And,

IT FURTHER APPEARING that counsel for the government is prepared and desires to submit evidence upon the matters hereinbefore recited,

IT IS ORDERED that the submission of this cause be vacated, and said cause is set for further hearing on the 9th day of August, 1934, at the hour of 10 AM.

LOS ANGELES, CALIFORNIA
TUESDAY, AUGUST 7, 1934 11:00 O'CLOCK A. M.

. . . o0o . . .

THE COURT: We will resume this hearing in the Patricia matter.

MR. SCHLEIMER: May it please the court, before your Honor takes up that matter, I desire to call the court's attention that on August 2nd, 1934 the court made an ex parte minute order, and the usual exception, the customary exception has not been granted to the respondent and the claimant to that order. I therefore, at this time, move that such an exception be granted nunc pro tunc as of that date, and that the minutes be corrected accordingly.

THE COURT: That is to the order of August 2nd, setting the matter down for further hearing?

MR. SCHLEIMER: Yes, your Honor.

THE COURT: Does the Government desire an exception to that?

MR. IRWIN: No, your Honor.

THE COURT: Then, an exception may be noted, nunc pro tunc, as to the claimant.

MR. SCHLEIMER: At this time the claimant and respondent moves to set aside the ex parte order dated August 2nd, 1934, setting this matter down for hearing, upon the ground that the matters set forth in that ex parte order are not in issue or are not any issue tendered by the Government, either in the original libel of information or in the amended libel of information; therefore,

(Testimony of Charles W. Salter)

evidence could not be taken of the proposed matters stated in the ex parte order.

THE COURT: That motion is denied, and you may have an exception. Now, may we proceed with the taking of further evidence?

MR. IRWIN: Yes, your Honor. Mr. Salter, will you take the stand?

CHARLES W. SALTER,

called as a witness on behalf of the Libelant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

In answer to MR. IRWIN: I am Assistant Collector of Customs, Los Angeles. Since the 22nd day of June, 1925. I have the seizure report with me.

In answer to THE COURT: The document that I have before me is a part of the official records of the office of the Collector. One of the signatures appearing on this document puports to be the name of Frederick J. Dwight. He was on March 25, 1932, a member of the Coast Guard Service, with headquarters at the Base at San Pedro. Written down at the bottom in the lower right-hand corner is W. F. Mahan, who was then Deputy Collector in charge of the Customs at San Pedro. He is now deceased. This document has two official numbers. Number 223 and the line marked subport is the seizure number of the San Pedro office. Seizure No. 11,800 is the seizure number for the district and the official number of the seizure. That latter number is the one given to the document by my office.

(Testimony of Charles W. Salter)

THE COURT: The document itself may be received in evidence, and in lieu of leaving the original, a copy may be substituted.

MR. SCHLEIMER: May it please the court, I respectfully object to the introduction in evidence of this document upon the ground that it is not within the issues and it is now an attempt being made to inject in the case an issue that was not alleged in the original or in the amended bill of information.

THE COURT: The objection is overruled and an exception may be noted, and will Government's counsel arrange to substitute a copy for the original official document?

MR. IRWIN: Yes. I have a copy right here, which I will be prepared to offer in lieu of the original.

MR. SCHLEIMER: I would like to have a copy of that. If they are going to substitute a copy I would like for them to furnish me a copy of that.

THE COURT: Government's counsel can arrange for that later. We can't very well do it at this time.

MR. SCHLEIMER: That is satisfactory.

MR. IRWIN: Very well, your Honor.

THE CLERK: Is that to be marked, your Honor?

THE COURT: Have you the copy?

MR. IRWIN: I would like to have it marked Government's Exhibit next in order, your Honor.

THE COURT: We might give it a new series of exhibit numbers, that is, Government's Exhibit No. 1 for the hearing held on this date.

MR. IRWIN: Very well, your Honor.

(Testimony of Charles W. Salter)

[Government Exhibit No. 1 on Hearing of 8/7/34.]

11800

Customs Form 5955
TREASURY DEPARTMENT
T. D. 41639
Art. 1023, C. R. 1923
Revised June, 1931

Headquarters
Port No.....
Subport No. 223
Declaration
or Entry No.....

REPORT OF SEIZURE

United States Customs Service
U. S. COAST GUARD,
District No. Section Base #17.
Port of San Pedro, California.
Section Base #17. Office 25 March, 1932.
(Preparing office) (Date of preparation)

Sir: You are hereby notified that the property described below was seized from T. Tomkiawa, ex Ameri-
(Name of Individual)
can Oil-Screw PATRICIA arriving from High Seas, at
(Vessel or vehicle) (port or place)
Lat. 33° 18′ 30″ N., Long. 117° 47′ 45″ W., on 23 March,
(Place of seizure) (Date of seizure)
1932, and has been delivered to the Customs Seizure Room

Describe property here.	Foreign value	Domestic value
The American Oil-Screw PATRICIA of Los Angeles,	Appr value	$8000.00
Equipment and apparel.	W E K	
Delivered to Deputy Collector of Customs.	EXAMINER. MAR 29 1932	

(Testimony of Charles W. Salter)

State circumstances here.

While cruising on regular patrol 23 March, 1932, the CG-259 at 1515 stopped to board the American Oil-screw PATRICIA of Los Angeles. Upon boarding, her cargo holds were found to be loaded with sacked liquor. Took the crew of three, Nick Bartich, T. Tomikawa and G. Horote, aboard the CG-259 and placed Mo. M. M. 1c Edward Engle and Sea. 1c Louie J. Cousino aboard the PATRICIA. After notifying Base Commander by radio, proceeded to Section Base 17 with PATRICIA in tow. 0020, 24 March, 1932, secured at Base 17. Prisoners turned over to U. S. Customs Officials. An armed guard was placed over PATRICIA and cargo. Continued guard until the cargo of liquor was officially turned over to Deputy Collector of Customs.

(Continue on reverse side)

Sections of laws violated: R. S. 4377 and 4337, Sec. 593 (a), (b), Tariff Act of 1922, R. S. 3450, R. S. 5440.

Names and designations of officers making physical seizure: Frederick J. Dwight, C. B. M.

Arrests: Nick Bartich, T. Tomikawa and G. Horote.

Frederick J Dwight
Frederick J. Dwight, C. B. M.
(Name)
Officer in Charge CG-259.
.....of Customs.
(Designation)

(Testimony of Charles W. Salter)

To the Collector of the Port.

Copies to: DCC (10); Comdt. USCG (3);
U. S. District Atty. (1). Cal. Div. (1) File (1).

To the Appraiser: You will examine and appraise the above-described seized goods according to Sec. 606, T. A. 1930, and indorse return hereon. If perishable or immediate sale advisable, so state.

H. F. Shabor
Dep. Collector.

To be prepared in sextuplet; one copy to be retained by seizing officer's department, two copies for use of the Collector, and one copy each for the Bureau of Customs, the Comptroller of Customs, and the Department of Justice. In cases of customs seizures of boats, a copy of this report should be sent to the Commandant, U. S. Coast Guard.

[In pencil on face]:

Built
1924
———
71 Gr
43 net
———
L. 81 ft
B. 18
100 H P
1924 F. B. Morse
Jap 970 A

[Endorsed]: No. 5567-H Adm. U. S. vs. "Patricia" Gov. Exhibit No. 1 on hearing of 8/7/34. Filed 8-7 1934 R. S. Zimmerman, Clerk U. S. Dist. Court - So. Dist. Calif. By M. R. Winchell Deputy Clerk

(Testimony of Charles W. Salter)

In answer to MR. IRWIN: We have had numerous seizures adopted by our office that have been made by the Coast Guard.

Q Now, with particular relation to the seizure of the boat "Patricia", was there any other seizure other than No. 11,800 made by your office?

MR. SCHLEIMER: I object to that as irrelevant and immaterial, and furthermore it is admitted by the pleadings that the Collector of Customs has adopted the seizure. We allege that.

THE COURT: Objection overruled and you may have an exception.

THE WITNESS: Will you read the question?

(Question read by the reporter.)

THE WITNESS: May I refer to the official records?

BY MR. IRWIN:

Q. Yes, if you will, please.

A Yes, sir.

Q Has that a number?

A It has.

Q What is that number?

A 11,799.

Q Have you that document with you?

A Yes, sir.

THE COURT: Let the record show that counsel for the claimant has examined the document No. 11,799.

MR. IRWIN: Which the witness has just stated was likewise a separate seizure made in connection with the Oil Screw "Patricia".

(Testimony of Charles W. Salter)

Q Now, this record of seizure is dated March 25, 1932, the same date as Government's Exhibit 1 of this date, which was just previously introduced; is that correct?

A. Yes.

Q And what was incorporated in this seizure?

MR. SCHLEIMER: Objected to, the document speaks for itself.

MR. IRWIN: All right, I offer the document in evidence as Government's Exhibit 2 of this date, and ask that a copy be substituted hereafter.

MR. SCHLEIMER: Objected to for the reason the original libel of information and amended libel of information alleged the seizure and that it was adopted by the Collector of Customs, and that was admitted by the respondent and claimant, and it is immaterial and irrelevant and simply an attempt being made now to inject an issue which is not before the court.

THE COURT: This document is also part of the official records of your office?

THE WITNESS: Yes, sir.

THE COURT: And the signature Frederick J. Dwight is the signature of the same Mr. Dwight whom you previously mentioned?

THE WITNESS: Yes, sir.

THE COURT: And the document—the signature at the bottom with the initials, is that of the former Collector of the port?

THE WITNESS: Yes, sir.

THE COURT: He was the collector of the port at the time of the date of the document?

(Testimony of Charles W. Salter)

THE WITNESS: Yes, sir.

THE COURT: Now, is a copy to be used in place of the original?

MR. IRWIN: Yes, your Honor.

THE COURT: Objection overruled and an exception may be noted, and the document will appear in evidence as Government's Exhibit No. 2, for this hearing, and a copy of the same may be substituted.

[GOVERNMENT EXHIBIT No. 2 ON HEARING OF 8/7/34.]

11799

Customs Form 5955

TREASURY DEPARTMENT

T. D. 41639

Art. 1023, C. R. 1923

Revised June, 1931

Headquarters
Port. No.....
Subport No. 222
Declaration
or Entry No.....

REPORT OF SEIZURE

United States Customs Service
U. S. COAST GUARD,
District No. Section Base #17.
Port of San Pedro, California.
Section Base #17. Office 25 March, 1932.
(Preparing office) (Date of preparation)

(Testimony of Charles W. Salter)

Sir: You are hereby notified that the property described below was seized from T. Tomikawa and the
Nick Bartich
G. Horoti
(Name of individual)
~~ex~~ American Oil-Screw PATRICIA arriving from
(Vessel or vehicle)
High Seas, at Lat. 33° 18′ 30″ N., Long. 117° 47′ 45″ W.,
(Port or place) (Place of seizure)
on 23 March, 1932, and has been delivered to the Customs
(Date of seizure)
Seizure Room.

Describe property here	Foreign value	Domestic value
1749—Sacks supposed to contain assorted Liquors and retained under section 607 act of 1930 not to exceed $1000.00 in value MAR 29 1932 C C Babcock ex appraiser merchandise ACTING APPRAISER		
1749—Sacks of assorted *spiritus* liquor.		
112—Empty metal 50-gallon oil drums. not at off. stores Delivered to Deputy Collector of Customs.		apprs. by W. E. K. at $56.00

Appraised value as is $17,490.00 in conformity as per letter attached.

APR 21 1932

C C Babcock
ex appraiser merchandise
ACTING APPRAISER

(Testimony of Charles W. Salter)

State circumstances here.

While cruising on regular patrol 23 March, 1932, the CG-259 at 1515, stopped to board the American Oil-Screw PATRICIA of Los Angeles. Upon boarding, her cargo holds were found to be loaded with sacked liquor. Took the crew of three, Nick Bartich, T. Tomikawa and G. Horote, aboard the CG-259 and placed Mo. M. M. 1s Edward Engle, and Sea. 1c Louie J. Cousino aboard the PATRICIA. After notifying Base Commander by radio, proceeded to Section Base 17 with PATRICIA in tow. 0020, 24 March, 1932, secured at Base 17. Prisoners turned over to U. S. Customs Officials. An armed guard was placed over PATRICIA and cargo. Continued guard until the cargo of liquor was officially turned over to Deputy Collector of Customs.

(Continue on reverse side)

Oil drums retained on "Patricia".

ADVERTISED AUG 17 1932

5 sacks liquor held for evidence.

1744 sacks liquor DESTROYED FEB-9 1933

Sections of laws violated: R. S. 4377 and 4337., Sec. 584 [in pencil].

593 (a), (b), Tariff Act of 1922.

Names and designations of officers making physical seizure: Frederick J. Dwight, C. B. M.

(Testimony of Charles W. Salter)

Arrests: Nick Bartich, T. Tomikawa and G. Horote.

Frederick J. Dwight, C. B. M., USCG,
Frederick J Dwight
Officer in Charge CG-259.
(Name)
.....of Customs.
(Designation)

To the Collector of the Port.

Copies to: DCC-(10); Comdt. USCG (3);

U. S. District Atty. (1). Cal. Div. (1); File (1).
3/29/32

To the Actg Appraiser: You will examine and appraise the above-described seized goods according to Sec-606, T. A. 1930, and indorse return hereon. If perishable or immediate sale advisable, so state.

HOWARD W. SEAGER, by B. N. D.
Collector.

To be prepared in sextuplet; one copy to be retained by seizing officer's department, two copies for use of the Collector, and one copy each for the Bureau of Customs, the Comptroller of Customs, and the Department of Justice. In cases of customs seizures of boats, a copy of this report should be sent to the Commandant, U. S. Coast Guard.

[In pencil on face]: Jap 970 A

(Testimony of Charles W. Salter)

IN REPLY REFER TO: BN
Case No. 11799

[Emblem]

OFFICE OF THE COLLECTOR
DISTRICT NO. 27

Address all Communications for this Office to the Collector

TREASURY DEPARTMENT
UNITED STATES CUSTOMS SERVICE
LOS ANGELES, CALIF.

April 19, 1932

Acting Appraiser
Los Angeles, California
Sir:

Attached hereto is Seizure Report No. 11799 covering 1749 sacks of assorted liquor seized from the American Oil-Screw PATRICIA on 3/25/32.

It is requested that the liquor be appraised according to its domestic value for the purpose of assessing a penalty, the appraisement under Section 607 applying only to forfeiture proceedings.

Respectfully,
Howard W. Seager
Collector of Customs
By: Chas W Salter
Assistant Collector

Incl.

[Endorsed]: No. 5567-H Adm. U. S. A. vs."Patricia." Gov. Exhibit No. 2 on hearing of 8/7/34. Filed 8-7 1934 R. S. Zimmerman, Clerk U. S. Dist. Court - So. Dist. Calif. By M. R. Winchell Deputy Clerk

(Testimony of Charles W. Salter)

In answer to MR. IRWIN: I signed the letter dated April 1, 1932 on the letter head of the Treasury Department, addressed to the United States Attorney. I attached a copy of the report as stated in that letter.

In answer to THE COURT: I sent the letter dated April 1, 1932, addressed to the United States Attorney, accompanied by a copy of what is designated as Seizure Report No. 11,800, to the United States Attorney for this District.

THE COURT: We notice a file mark endorsed on the letter indicating that the same was received by the office of the United States Attorney for this District under date of April 4, 1932. Will proof be required to show that this document has been produced from the files of the United States Attorney's office?

MR. SCHLEIMER: Without waiving any right, I don't know why such proof should be required.

THE COURT: Yes, but objection is interposed to the document going into evidence?

MR. IRWIN: The offer is now made. The document which has just been identified by the witness on the letterhead of the Treasury Department, dated April 1, 1932, addressed to the United States Attorney, and signed Howard W. Seager, Collector of Customs, by Charles W. Salter, Assistant Collector, and accompanied by a copy of official report of Seizure No. 11,800, we ask that it be received in evidence as Exhibit 3, under the date of this hearing.

MR. SCHLEIMER: Objected to as the libel of information states a seizure was adopted by the collector of

(Testimony of Charles W. Salter)

customs, and that is admitted in the pleadings, and it is incompetent, irrelevant and immaterial, and further, it is an attempt to inject an issue not before the court.

THE COURT: Objection overruled and exception noted. The document will be marked as Government's Exhibit 3 for this hearing.

[GOVERNMENT EXHIBIT No. 3 ON HEARING OF 8/7/34.]

IN REPLY REFER TO: BN
Case No. 11800

[Emblem]

OFFICE OF THE COLLECTOR
DISTRICT NO. 27

Address all Communications for this Office to the Collector

TREASURY DEPARTMENT
UNITED STATES CUSTOMS SERVICE
LOS ANGELES, CALIF.

April 1, 1932

United States Attorney
522 Federal Building
Los Angeles, California

Sir:

Under the provisions of section 610 of the tariff act it is requested that libel proceedings be instituted against one American Oil-Screw PATRICIA, appraised value $8000, seized at San Pedro, California, on March 25, 1932 by the Coast Guard for violation of R. S. 4337, 4377, and sections 584 and 593 of the tariff act.

(Testimony of Charles W. Salter)

A copy of Seizure Report No. 11800 covering the said vessel is inclosed herewith.

A detailed report is to be submitted by the Customs Agents giving a list of *witness* to appear for the Government.

Respectfully,

Howard W. Seager
Collector of Customs.
By: Chas W Salter
Assistant Collector

Incl.

[Endorsed]: No. 5567-H Adm U. S. vs. "Patricia" Gov. Exhibit No. 3, on hearing of 8/7/34 Filed 8-7 1934 R. S. Zimmerman, Clerk U. S. Dist. Court - So. Dist. Calif. By M. R. Winchell Deputy Clerk

[For Seizure Report No. 11800, referred to above, see Government Exhibit No. 1 on Hearing of 8/7/34.]

MR. IRWIN: May I ask that the Clerk clamp them together?

Now, at this time, I desire to call the court's attention and read into the record particularly the return on the monition by the United States Marshal under date of April 28th, 1932.

THE COURT: That is already a part of the records in the case.

MR. IRWIN: It is. It is just in particular connection with this letter which we just received in evidence.

(Testimony of Charles W. Salter)

The monition was dated the 28th day of April, 1932, signed by R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy. The return states as follows—

MR. SCHLEIMER: (Interrupting) Before you read that, may I interpose an objection to it. I object to it upon the ground that it is irrelevant and immaterial. It is admitted by the original and amended libel of information that the seizure was made and that the seizure was adopted by the Customs Collector of this District, and that it is now an attempt being made to inject an issue which is not before the court, and irrelevant and immaterial.

THE COURT: Objection overruled and exception noted.

MR. IRWIN: The return states as follows: "In obedience to the within monition, I attached the American Oil Screw "Patricia" therein described, on the 28th day of April, 1932, and have given due notice to all persons claiming the same, that this court will, on the 23rd day of May, 1932, if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter, proceed to the trial and condemnation thereof, should not claim be interposed for the same. Dated April 28, 1932, A. C. Sittel, U. S. Marshal, by Morris Tovil, Deputy." That was made a part of these records of the United States District Court, file No. 5567-H.

THE COURT: What is the description contained in the body of the monition?

MR. IRWIN: The body of the monition states, "The President of the United States of America, to the Mar-

(Testimony of Charles W. Salter)

shal of the United States for the Southern District of California Greeting: WHEREAS, a libel in rem hath been filed in the District Court of the United States for the Southern District of California on the 28th day of April, in the year of our Lord (1932) one thousand nine hundred and thirty-two by the United States of America, Libelant, vs American Oil Screw Boat "Patricia" No. 970-A, her cargo, engines, tackle, apparel, furniture, etc., respondent" etc.

I particularly read this to show the return is made only as to the boat "Patricia".

(Argument.)

In answer to MR. IRWIN: The red ink figures on this report are the figures of the Examiner of Merchandise and the approval of the Appraiser of Merchandise who was then known as the Acting Appraiser, covering 1,749 sacks supposed to contain assorted liquors and returned under Section 607, Act of 1930, not to exceed $1,000.00. That is for forfeiture purposes. The appraised value $17,490.00 is in conformity with the requirement of the regulations that a value be obtained, the domestic value, for the purpose of assessing penalties against the Master of the Vessel.

In answer to THE COURT: That is the usual practice of our office.

In answer to MR. IRWIN: You understand, reverting to the seizure No. 11,800 covering the vessel, the vessel was never taken out of the water and turned over to the Deputy Collector at San Pedro, but the liquors, for safe-keeping, were transported immediately to the ap-

(Testimony of Charles W. Salter)

praisers stores in Los Angeles and placed in the seizure room, and pending their ultimate appraisement and disposition. The letter which is attached to this seizure report No. 11,799, Government's Exhibit 2, which was directed to the Acting Appraiser, signed by Mr. Salter. That is my signature wherein it is stated—

"Attached hereto is seizure report No. 11,799 covering 1,749 sacks of assorted liquor seized from the American Oil Screw 'Patricia' on 3-25-32. It is requested that the liquor be appraised according to its domestic value for the purpose of assessing a penalty, the appraisement under Section 607 applying only to forfeiture proceedings."

MR. IRWIN: Let the record show that the letter of July 8, 1933 has just been shown and examined by counsel for the respondent and claimant.

In answer to MR. IRWIN: The signature "Charles W. Salter", on this letter is my signature; that letter was written by me.

MR. IRWIN: Do you care to stipulate, counsel, that this letter was received by me on July 8th, 1933?

MR. SCHLEIMER: I will take your word for it.

MR. IRWIN: At this time I offer the letter of July 8th, 1933, on the letterhead of the Treasury Department, United States Customs Service, to the United States Attorney, attention Assistant Attorney Irwin, signed by Charles W. Salter, Assistant Collector, as being directions to the United States Attorney and a summary by the Assistant Collector of what was done by him in connection with the cargo of the boat "Patricia".

(Testimony of Charles W. Salter)

MR. SCHLEIMER: I object to it upon the ground that it is a self-serving declaration, and on the further ground that I have heretofore urged in this matter today.

THE COURT: Objection overruled and exception may be noted and the document will be marked as Government's Exhibit No. 4, for this hearing.

[GOVERNMENT EXHIBIT No. 4 ON HEARING OF 8/7/34.]

CWS:R

IN REPLY REFER TO: Seizure #11799
" #11800

[Emblem]

OFFICE OF THE COLLECTOR
DISTRICT NO. 27

Address all Communications for this Office to the Collector

TREASURY DEPARTMENT
UNITED STATES CUSTOMS SERVICE
LOS ANGELES, CALIF.

July 8, 1933

United States Attorney
Federal Bldg.
Los Angeles, Calif.

Sir: Attention—Asst. Atty Irwin

Responding to your telephone request for memoranda relative to the facts concerning the seizure of the oil screw vessel PATRICIA and the seizure of 1749 sacks of liquor, I respectfully submit the following:

(Testimony of Charles W. Salter)

On March 23, 1932 there was seized by the Coast Guard at Los Angeles the oil screw vessel PATRICIA, which was covered by customs seizure #11800. An additional seizure #11799 covering 1749 sacks of liquor and 112 empty oil drums was made.

In accordance with the provisions of Section 607 of the Tariff Act of 1930 merchandise the importation of which is prohibited shall be held not to exceed $1000. in value. Therefore the forfeiture of the liquor, its value being fixed by the statute as not exceeding $1000., was sought in the manner prescribed by Section 607 by advertising for a period of three successive weeks. This advertisement was duly made in the Los Angeles Times on August 17, 24, and 31, 1932. Section 608 of the Tariff Act authorizes the claimant any time within twenty days of the date of the first publication of the notice of seizure to file with the Collector of Customs a claim stating his interest therein, and upon filing such claim and giving a bond to the United States in the penal sum of $250.00 it becomes the duty of the Collector of Customs to transmit such claim and bond to the United States Attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law which, as you are aware, results in the filing of libel proceedings and the placing of the seized and claimed merchandise in the custody of the United States Marshal.

In the case of the merchandise covered by Seizure #11799, which was duly advertised in the Los Angeles Times as stated above, at no time was any claim filed nor were libel proceedings instituted, nor was the merchan-

(Testimony of Charles W. Salter)

dise taken into the custody of the United States Marshal. It was, however, duly forfeited under due process of law

United States Attorney – 2 –

to the Government and its destruction was ordered on September 13, 1932. Prior to directing the destruction of this liquor communication was had with the United States Attorney's office with a view to determining what quantity, if any, was desired by that office to be held as evidence to be presented to the court in the prosecution of the criminal cases, and at the direction of the United States Attorney five cases were so retained and are still in the custody of this office to be used as evidence.

While the destruction of this liquor was ordered September 13, 1932 you will understand that with a limited force and lack of really suitable accommodation for the destruction of vast quantities of liquor (and there were many other seizures to be destroyed), the actual completion of the destruction of the liquor was not had until February 9, 1933. The destruction of the liquor by the customs was conducted by employees under the immediate supervision of the Appraiser of Merchandise in what is known as the United States Appraiser's Stores. The method of destruction was breaking of the bottles, the liquid running into the sewer.

In a report submitted to your office under date of April 1, 1932, your attention was invited to the provisions of Sections 584 and 593, Tariff Act of 1930, looking to the imposition of certain penalties against the offenders; also for the information of the court in the fixing of penalties the liquors were submitted to the Appraiser under the

(Testimony of Charles W. Salter)

provisions of Section 606 of the Tariff Act to determine the domestic value for use as a basis in fixing the penalty as outlined in Section 584. This value was returned as being $17,490.00.

It is respectfully submitted that in connection with seizure #11799 covering the 1749 sacks of liquor there is nothing in the record which shows that the institution of libel proceedings was ever requested by the Collector of Customs; on the contrary the merchandise was duly advertised for forfeiture in conformity with the provisions of Section 607 of the Tariff Act was duly forfeited without any claim having been filed, and this particular merchandise remained continuously in the custody of the Collector of Customs and at no time came within the custody of the court by having been taken over by the United States Marshal's office.

United States Attorney – 3–

Seizure #11800 covers the vessel PATRICIA, its engine, tackle, apparel, furniture, etc., and is entirely separate and distinct from seizure #11799. Inasmuch as the appraised value of this vessel was $8,000.00 it was mandatory under the provisions of Section 610, Tariff Act of 1930 that the seizure be reported to the United States Attorney's office for the institution of appropriate proceedings for the condemnation of such property, and it is respectfully submitted that it was in error, and entirely without the knowledge of this office until very recently that in the preparation of the libel proceedings seeking the forfeiture of the vessel the word "cargo" was included therein.

(Testimony of Charles W. Salter)

If this office may express an opinion to you, it would seem that there are two distinct cases involved in connection with the PATRICIA—that of the forfeiture or attempted forfeiture of the vessel, covered by seizure #11800; that of the forfeiture of the liquors, covered by seizure #11799; that the action of this office was absolutely in conformity with the law in both instances. In the case of the PATRICIA, the appraised value being more than $1,000., the rule laid down in Section 610 being followed. In the seizure of liquors, the statute particularly provides that for forfeiture purposes prohibited importations are valued at not more than $1,000. and prescribing forfeiture to be accomplished in the absence of a claim by advertising. There having been filed no claim, there was no necessity for referring this particular seizure to the United States Attorney's office requesting the institution of forfeiture proceedings. Therefore the merchandise involved in seizure #11799 never came into the custody of the court, but was disposed of in accordance with the law.

It is hoped that the above may be of some service to you. If there is anything else that this office can furnish, which may be of assistance, we shall indeed be glad to do so.

Respectfully,

Chas. W. Salter

Chas. W. Salter

Assistant Collector

[Endorsed]: No. 5567-H Adm U. S. vs. "Patricia". Gov. Exhibit No. 4 on hearing 8/7/34 Filed 8-7 1934 R. S. Zimmerman, Clerk U. S. Dist. Court - So. Dist. Calif. By M. R. Winchell Deputy Clerk.

(Testimony of Charles W. Salter)

In answer to MR. IRWIN: I took steps, in connection with the provisions in Section 607 of the Tariff Act of 1930, with respect to this liquor. I directed that the liquor be advertised for forfeiture, and the advertising was done, starting in the Los Angeles Times with its issue of August 17, 1932. That is shown in stamp on the side where it is stamped as "Advertised August 17, 1932". There were two other publications, the 24th of August and 31st of August. There was no claim filed or any bond posted with my office. The liquor was automatically forfeited to the Government, and ordered to be destroyed, after having consulted with the office of the United States Attorney to determine whether or not it was his desire to have any, and if so, how much, of this liquor to be retained as evidence for use in any criminal trial that might take place. Five cases was retained. The stamp at the bottom of page 1, of Government's Exhibit 2, in ink, "1,744 sacks of liquor" and then stamped "destroyed Feb. 9, 1933," correctly represents what was done with that liquor under my direction on that date; that is 1,749 sacks originally seized, less the 5 sacks retained by the United States Attorney for evidence. Government's Exhibit 1, in the red ink in reference to the American Oil Screw "Patricia", appraised value $8,000, was placed on there after appraisal on March 29, 1932. The initials "W. E. K." are the examiner, W. E. Kelly. He was the one that made the appraisement and he was in the service at that time; he was the examiner of merchandise at San Pedro, California.

MR. IRWIN: That is all.

(Testimony of Charles W. Salter)

CROSS-EXAMINATION

In answer to MR. SCHLEIMER: My title is Assistant Collector. I was such in March, 1932. The first advice that I personally received of the seizure was by telephone the day the seizure reports were turned over to the Deputy Collector at San Pedro, at which time arrangements were made to have the liquors transported to the Appraisers Stores in Los Angeles.

BY MR. SCHLEIMER:

I have no knowledge where it was transported from in San Pedro. I have no recollection of having been informed that the cargo was seized. I would suppose that is true. It was seized by the Coast Guard. I received the telephone information of the seizure of the vessel "Patricia" and cargo. To the best of my memory, it was on or about March 25. I ascertain it from the date of the report. I can't say definitely the date that I was informed by telephone communication of the seizure. Then I gave instructions to remove the cargo to Los Angeles to place it in the warehouse of the Customs Collector. Subsequent to the seizure I received a telephone communication of the seizure of the vessel "Patricia" and her cargo on the date that she was seized. I have no knowledge how soon after that. It might have been the same day. I received a telephone communication from the then Deputy Collector of Customs in charge at San Pedro, to the effect that the Coast Guard had turned over the seizure reports covering the liquor and the vessel; that the liquor, following the usual custom, was being sent to the Appraisers Stores for safe-keeping. That I believe may

(Testimony of Charles W. Salter)

have been on the 25th of March, which is the date of the seizure report covering the vessel; likewise the date of the seizure report covering the liquor. Then the liquor was placed in storage. There were a number of drums aboard the ship that were not taken off. Empty oil drums that remained on the vessel. The liquor was taken off the vessel and placed in the warehouses as I have testified. The liquor taken off of the vessel and placed in the warehouse on the same day that I received the telephone message. It may have been the 25th of March or thereabouts. It might have been the day the Coast Guard seized the vessel. I have no recollection sending to the United States Attorney's office a copy of the seizure report covering the liquor. I did send to him a copy of the seizure report covering the vessel, and requested him to institute libel proceedings. You will understand that these reports are prepared by representatives of the Coast Guard. The Coast Guard may have sent it, but I did not. I received the original and several copies of the reports. Mr. Dwight prepares this report and he makes the notations "copies to D. C. C. (10); Commandant U. S. C. G. (3); U. S. District Attorney (1); Cal. Div. (1); file (1)." I received the original report covering the vessel, and the one covering the liquor. After appraisement was had I took it up with the United States Attorney with relation to the vessel.

BY MR. SCHLEIMER:

Q Who, Mr. Chichester?

A The record speaks for itself. Asking for forfeiture proceedings to be instituted.

(Testimony of Charles W. Salter)

Q That was the next step you did?

A Yes, sir, on April first.

Q Then you, acting on behalf of the Customs Collector, adopted the seizure made by the Coast Guard as to the vessel and the liquor, the cargo, is that right?

MR. IRWIN: Objected to as calling for a conclusion of the witness. The evidence has shown that there has been two separate seizure reports made, and he is incorporating them both together.

THE COURT: But is there any dispute about the fact that while the letter to the United States Attorney instructed him to institute libel proceedings with respect to the boat, that the Collector adopted the seizure also as to the liquor and proceeded to act as he considered he should proceed, as to the liquor?

MR. IRWIN: May it please the court, that is not the exact contention. That is what we are arguing about, that there were two separate seizures adopted by the collector, one he adopted was that of the boat, and the other was that of the liquor. Therefore, I have no objection to counsel saying whether or not he adopted those two seizure reports submitted to him by the Coast Guard, because that was what was done.

MR. SCHLEIMER: I know the District Attorney would like to have me state it that way, but your Honor will remember at the very inception of this case we had Mr. Dwight here, and he testified that he made one seizure, went on board the vessel and took charge of it and then took charge of the liquor and brought it to San Pedro. What they are trying to do is to split it, that there were

(Testimony of Charles W. Salter)

two separate seizures, but there was not; there was only one seizure, except that there were two separate reports. And the Collector adopted the seizure.

MR. IRWIN: I think the record speaks for itself. We have two seizure reports.

THE COURT: Let's go ahead with the evidence.

THE WITNESS: In that connection I may say this: In the transaction of our business, all very largely governed by the regulations, the regulations of 1931 require, where the value of the vessel or the vehicle exceeds $1,000 and therefore subject to libel, and not subject to forfeiture by advertising, and the liquors and other prohibited articles are seized at the *itme* the vessel is seized, that they must be segregated. The regulations are there on the table if you wish access to them.

THE COURT: Perhaps counsel can read into the record the regulations.

MR. SCHLEIMER: I think we should be permitted to finish our cross examination.

THE COURT: Yes, go ahead.

BY MR. SCHLEIMER:

Q You, on behalf of the Customs Collector, adopted the seizure made by Mr. Dwight, did you not?

A Covering what?

Q Covering the vessel and the cargo and anything on board?

A One sizure was adopted covering the vessel, another seizure was adopted covering the liquors, and the drums.

(Testimony of Charles W. Salter)

Q Is it not a fact that Mr. Dwight made one seizure at one time of the vessel and everything that was on board?

THE COURT: How could you ask this witness to speak for the officer, Mr. Dwight?

MR. SCHLEIMER: If he doesn't know it, he can say so.

THE COURT: It is perfectly obvious that he was attending to his business up here, and Mr. Dwight down at the Coast Guard Base.

MR. SCHLEIMER: But he told us he received a telephone communication as to the vessel and the cargo, and I am asking as to how he made the adoption.

THE COURT: Read the question.

(Question is read by the reporter.)

THE WITNESS: I would say no.

BY MR. SCHLEIMER:

Q. Why not?

A Because he submitted two seizure reports, one covering the liquors and drums, and the other covering the vessel.

Q. Is it not a fact that you told us that he was required to make two separate reports under the regulations?

A Yes, sir.

Q And as a matter of fact he only made one seizure, but two separate reports?

A I have no knowledge.

Q Now you, on behalf of the Collector, adopted these seizures, did you not?

A Yes, sir.

(Testimony of Charles W. Salter)

Q That is as to the vessel and the liquor that was on board the vessel?

A Yes, sir.

Q And you adopted the reports made by Mr. Dwight?

A. Yes, sir.

Q Then you forwarded a report that you received from Mr. Dwight regarding the *vessel* with a letter to the District Attorney's office and requested them to take action?

A Yes, sir. That was not the first step that was taken.

Q That was not the first step?

A No, sir.

Q What was the first step?

A To direct an appraisement be made of the vessel, and an appraisement to be made on the liquors.

Q And you have already told us how that was done?

A. Yes, sir.

Q And then the second step was sending a copy of the report regarding the vessel, with your letter to the District Attorney's office, requesting that they bring action?

A Yes, sir.

Q And then this libel suit was filed, is that correct?

A It is.

MR. IRWIN: I object to that as the record speaks for itself.

THE COURT: Well, so far as the witness knows, that is what happened. Is that your answer?

THE WITNESS: That is it, yes.

(Testimony of Charles W. Salter)

BY MR. SCHLEIMER:

Q. Now, this libel suit was filed about April 28th, 1932, am I correct about that?

A. I believe you are.

Q. You had knowledge of that?

A The only knowledge I had of it was that we requested the United States Attorney to institute libel proceedings against the vessel.

Q. And do you recall interviewing Mr. Chichester, an assistant or deputy United States Attorney?

MR. IRWIN: I will stipulate there was an assistant by the name of Frank Chichester, and that he participated in the conduct of this litigation.

THE WITNESS: I may have talked with him about it, but I don't recall it.

BY MR. SCHLEIMER:

Q. Did he confer with you regarding the preparation of the libel information to be filed?

A No, sir.

Q On April 28th, 1932 the liquor that was seized and removed to the warehouse was still at the warehouse, was it not?

MR. IRWIN: Objected to as calling for a conclusion of the witness.

THE COURT: Well, according to the records of your office, is that a fact?

THE WITNESS: Yes, sir, it is.

(Testimony of Charles W. Salter)

BY MR. SCHLEIMER:

Q. Now, when did you decide to advertise the liquor for the destruction?

A When we had a sufficient number of seizures requiring an advertisement to warrant placing an advertisement in the papers.

Q I asked you when, regarding the date?

A It would have been somewhere between the first or fifteenth of August.

Q What year?

A 1932.

Q So that up to that time the liquor was still at the warehouse?

A Yes, sir.

Q Do you recall that I procured a subpoena from the clerk of this court and served it on the collector, and do you recall being present in court when we were discussing or making an application to quash the seizure?

MR. IRWIN: Objected to as being ambiguous. If counsel knows the date, I ask that he give the date.

THE COURT: As far as the witness has recollection, he may answer.

THE WITNESS: I have never been in court in connection with this case until today.

BY MR. SCHLEIMER:

Q. Never been in court?

A Not in connection with this case, nor have I been served with any subpoena to appear in court in connection with this case.

(Testimony of Charles W. Salter)

Q Could you swear to that?

A Yes, sir.

Q Do you recall the collector turning over the subpoena to you?

A No, sir.

Q Do you recall the Deputy Collector in San Pedro turning over the subpoena to you?

A No, sir.

Q. You don't recall it?

A No, sir.

(Argument.)

THE WITNESS: I have no recollection of participating in any such conference until after the destruction, when I conferred with you.

In answer to MR. SCHLEIMER:

A I don't see anything on the reports that would lead me to believe that I had a conference regarding the destruction of the liquor. I recall that you called at the office for information as to where the cargo was stored. I recall sending for the file. I recall opening the file in your presence and giving you certain information from the contents of my file. I do not recall giving you the information that before I ordered the destruction of the liquor I conferred with the District Attorney's office, and that I indicated on the records where I had such a notation. I have my file here.

Q Will you kindly produce it?

THE COURT: Gentlemen, this hearing is going on so far during the noon hour, we will have to call a halt of it. We have an afternoon session as well, and we are

(Testimony of Charles W. Salter)

going to suggest that the proceedings will have to be somewhat expedited.

At the present time we seem to be spending a lot of time fishing for something about which there is considerable doubt as to whether it ever had any existence. At any rate it is now far into the noon recess, having in mind that we still have matters engaging our attention this afternoon, we shall resume this hearing at 2:00 o'clock.

Can you return at that time?

THE WITNESS: Yes, sir, I will be here.

(Whereupon, an adjournment was taken until 2:00 o'clock P. M.)

LOS ANGELES, CALIFORNIA

TUESDAY, AUGUST 7, 1934 2:00 O'CLOCK P.M.

. . . o0o . . .

THE COURT: Now, then, I believe Mr. Salter was on the stand.

CHARLES W. SALTER,

called as a witness on behalf of the Libelant, having been previously sworn, resumed the stand and testified further as follows:

CROSS-EXAMINATION (continued)

In answer to MR. SCHLEIMER: I recall Exhibit 4, of this date, that is the letter dated July 8th, 1933, which I wrote the United States Attorney, attention Mr. Irwin. On page 2 thereof I say that its destruction, meaning the

(Testimony of Charles W. Salter)

liquor, was ordered on September 13, 1932. I wrote that letter. I do not recall who ordered the destruction of the liquor, whether I or the Collector did. It was just done in the usual run of business. I may have signed the letter ordering its destruction or the Collector may have signed it. Those are always in writing. I have that order in my office. I recall the statement in the letter:

"Prior to directing the destruction of this liquor communication was had with the United States Attorney's office with a view to determining what quantity, if any, was desired by that office to be held as evidence to be presented to the court in the prosecution of the criminal cases."

To the best of my recollection that was verbal.

MR. IRWIN: I am going to object to any particular question along this line. This is not a test of Mr. Salter's memory. We stipulated, and counsel knows that the United States Attorney's office ask to have five cases held as evidence.

Those matters are usually handled by the Clerk in the office, who takes immediate charge of seizure reports.

Q But in this sentence that I read from the letter you said that there were communications had with the United States Attorney's office, and the question that I asked you was whether that communication was in writing or verbal, and you said it was verbal.

A That is to the best of my recollection at the present time.

Q I want to know with whom was that verbal communication with the United States Attorney's office?

(Testimony of Charles W. Salter)

A I have told you that usually it was had with the Clerk who has immediate charge of the seizure records.

Q Do you mean the Clerk in the United States Attorney's office?

A No, sir, the clerk in the Customs House.

BY MR. SCHLEIMER:

Q Is it not a fact that you personally had a communication with Chichester?

A No, sir.

Q Are you sure of that?

A I am quite sure of it.

Q Is it not a fact that you and Mr. Chichester consulted, and after conferences you decided to destroy the liquor, except the five cases?

MR. IRWIN: At this time I am going to object to this inference, unless counsel is prepared to assure the court with some offer of proof, when he is insinuating that this witness, a responsible official of the United States Government is committing perjury on the stand. Unless he is prepared to make such proof he should reframe the question.

THE COURT: Will counsel reframe the question and indicate the *aprpoximate* date and place when you allege such conference took place?

BY MR. SCHLEIMER:

Q Do you recall when I interviewed you at your office?

A Very distinctly.

Q Do you remember what date it was?

A No, I don't recall the date.

(Testimony of Charles W. Salter)

Q Well, is it not a fact that prior to that interview I had with you, you conferred with Mr. Chichester and at that conference it was decided that the liquor be destroyed except five cases?

MR. IRWIN: Since counsel has stated what his attitude is going to be, I am going to object to this question until sometime is fixed. He says, "prior to his conference with him", and as I understand it that was after or about the time the liquor was sold, or rather, destroyed, some eight months after this action was instituted. The witness has denied the conversation with Mr. Chichester.

THE COURT: Yes, let the question be reframed.

MR. SCHLEIMER: I can't see how I could.

THE COURT: Does counsel know?

MR. SCHLEIMER: He admitted that I conference with him.

THE COURT: Does counsel know that any conference took place between the witness and Mr. Chichester, of the character in question?

MR. SCHLEIMER: I intend to prove that Mr. Salter told me he had a conference with Mr. Chichester and that after this conference he ordered the liquor destroyed, and I propose to prove that.

THE COURT: It will be necessary to reframe the question, if any impeaching question is to be propounded, by making it more definite as to the time and place and parties present.

MR. SCHLEIMER: At the present time, I am not impeaching. I am interrogating on the letter he wrote, which is in evidence, and I believe that I have that

(Testimony of Charles W. Salter)

privilege to interrogate the witness as to what he meant by that phrase.

THE COURT: Suppose we go ahead with the matter. The court suggested that the question, along the line propounded to the witness, may be reframed, and in so doing it shall be fairly specific as to the time and place and parties present.

BY MR. SCHLEIMER:

Q Do you recall that I had a conference in your office?

A Very distinctly.

Q Have you any memorandum of the date of that?

A No, sir.

Q Do you recall who was present at that conference?

A You were there. Mr. Mitchell, I believe, brought the seizure records to my office, and I was there.

Q And do you recall also sending for Mr. Minick, the clerk, the Chief Clerk of the Marshal's office?

A Not at that time.

Q It was later in the conference, is that right?

A I believe I did either go to his office or asked him to come to my office. I don't recall which, but that was subsequent to the time when you first came in to my office.

Q That was the only time that I had a conference with you, is that right?

A No.

Q Any other conference?

A You came in once or twice after that.

(Testimony of Charles W. Salter)

Q That was in relation to the "Patricia" matter or another matter?

A In relation to the "Patricia" matter.

Q And the conference that I have reference to was the first one?

A Yes, sir.

Q Have you any way of fixing the time when that took place?

A No, I have not.

Q Now—

A (Interrupting) Wait a minute. I can't give you the date, but you may be able to fix it. It was, as I understood from the statements which you made, it was subsequent to the hearing had in this court, prior to any actual decision having been made.

Q Did you at that conference state to me that the liquor was destroyed?

A Except the five cases, yes.

Q And did you at that time state to me that before the liquor was destroyed you advertised in the Times?

A Yes, sir.

Q And did you at that time also state to me that you conferred with the United States Attorney before you destroyed the liquor?

A I don't think so.

Q What is your best recollection about that?

A No.

Q What?

A No.

(Testimony of Charles W. Salter)

Q Now, in this letter of July 8th, 1933, Government's Exhibit 4, of this date, you state at page 2 as follows:

"Prior to directing the destruction of this liquor communication was had with the United States Attorney's office with a view to determining what quantity, if any, was desired by that office to be held as evidence to be presented to the court."

Does that refresh your recollection as to whether or not you had communication with the United States Attorney regarding the destruction of the liquor?

MR. IRWIN: I am again going to ask the court's indulgence. The witness has testified that that matter was handled by a clerk in his office.

THE COURT: Will you let the witness answer it again.

THE WITNESS: The communication which may have been had or was had, no doubt with the United States Attorney's office, had no regard to the destruction of the liquor. It was for the purpose of ascertaining whether or not, and if so, how many cases the United States Attorney's Office would desire should be retained for evidence at the trial of the criminal case.

BY MR. SCHLEIMER:

Q You had that communication in writing or verbal?

A As I said before, to the best of my recollection that was verbal.

Q Did you confer with Mr. Chichester at any time about the criminal or civil case?

A No, sir, I am quite sure I did not.

(Testimony of Charles W. Salter)

Q Did he call at your office and have an interview with you?

A No, sir.

Q Did he 'phone you?

A Sir?

Q Did he 'phone you?

A So far as I recall, with relation to this case, no.

Q Was it with relation to the criminal case?

A No.

Q You do not recall that?

A No, sir.

Q Now then, you say further in this letter of July 8, 1933, Government's Exhibit 4 of this date, that the liquor was ordered destroyed on September 13th, 1932 and was not actually destroyed until February 9th, 1933. Is that correct?

A That is correct.

Q During that period of time had you learned of the pendency of this action or the criminal action?

MR. IRWIN: Objected to as incompetent, irrelevant and immaterial, and a deliberate attempt to mislead the court and the witness, because he skipped the whole explanation as to the circumstances between the date of the order of the forfeiture and the date of destruction of the liquor.

MR. SCHLEIMER: Will you let me try my case in my own way?

MR. IRWIN: I am interposing an objection on that ground.

THE COURT: I don't see what that has to do with it, Mr. Irwin.

(Testimony of Charles W. Salter)

MR. IRWIN: Very well, your Honor, I withdraw the objection.

(Question was read by the reporter.)

A I presume I had, because I had signed letters to the United States Attorney, requesting the institution of forfeiture proceedings against the vessel.

BY MR. SCHLEIMER:

Q Were you familiar with the various provisions of the practices, relating to the Government's attorney to institute actions of that character?

A Yes, sir.

THE COURT: What has that got to do with this hearing?

MR. SCHLEIMER: Your Honor has received this letter in evidence, and by this letter they propose to bind us by this gentleman's opinion on the stand that the United States Attorney has made an error, in that in the libel suit he inserted the word "cargo", and this gentleman finds fault with that, that he should not have inserted the word "cargo", but should have left it out, and he expresses an opinion on the law and on the statute as to what the United States Attorney should have done. And they propose to bind us by that letter, and we want to interrogate him as to the contents of this letter and to show to the court the actual facts as they existed.

THE COURT: Counsel will be at liberty, of course, to bring out the facts, but not to conduct a school of instruction interrogating this witness as to what he does or does not know about the law.

(Testimony of Charles W. Salter)

MR. SCHLEIMER: This is the letter which is in evidence as binding upon us as to his opinion and construction of the law, and it is an indirect way to express an opinion, or a direct way to express an opinion that the United States Attorney who had charge of the case was supposed to have made an error, but we claim he did not.

THE COURT: That is a matter of argument.

MR. SCHLEIMER: I want to cross-examine him, because under the statement it is not what he instructed him to do, but as to what the United States Attorney was of the opinion was the right thing to do. In other words, he could have instructed him to bring only the libel on the vessel, and yet the United States Attorney would have the right to bring a libel on the vessel and the cargo also.

THE COURT: All of this discussion serves to prove that we ought not to spend time in interrogating the witness as to the legal effect of any action or the substance of the opinion of the witness expressed in that letter.

MR. IRWIN: I only offered that letter to show a summary of what steps were taken by that office, and not his opinion.

MR. SCHLEIMER: Then if that is the case, I ask your Honor at this time to strike out from the evidence the entire Exhibit 4 of this date. Not only does it contain self-serving declarations, but it is also incompetent and contains hearsay evidence and opinions.

THE COURT: Well, so far as the document contains opinions as to the law, obviously the court will be governed not by statements of the document, but by what

(Testimony of Charles W. Salter)

the law is. Now, let's go ahead and proceed with the taking of evidence.

MR. SCHLEIMER: Do I understand your Honor denies my motion?

THE COURT: Yes.

MR. SCHLEIMER: May I have an exception please?

THE COURT: Yes.

BY MR. SCHLEIMER:

Q Have you a copy of the advertisement that was inserted in the newspapers?

A I haven't it with me.

Q Did you procure any order from any court or judge authorizing you to destroy the liquor?

MR. IRWIN: Objected to as entirely incompetent and immaterial, because he says the liquor was taken under Section 607 revised statutes, and that sets forth the matters to be done.

THE COURT: In other words, it is not claimed that the Collector of Customs acted under any court order?

MR. IRWIN: Certainly not, your Honor, with the one exception of the ultimate disposition of the five cases which were held as evidence, they were later disposed of.

THE COURT: Yes.

MR. SCHLEIMER: Another department of the Government, who is charged with enforcing the law, has filed a lawsuit here against the vessel and the cargo of liquor, and who had a legal right to file such a lawsuit.

THE COURT: Right here, Mr. Schleimer, there seems to be difficulty in apparently either the court understanding counsel or counsel understanding the court.

(Testimony of Charles W. Salter)

Counsel asked a question as to whether or not a court order had been obtained. That question has been answered by the admission of Government counsel. Now, let's proceed, not to argue a question that has been answered, but proceed to introduce any evidence, if you have.

MR. SCHLEIMER: Counsel for the Government did not answer it directly, he said that they advertised. Now, my question called for a specific answer whether or not there was an order obtained.

THE COURT: There was an admission by Government's counsel that no order was obtained from the court.

MR. SCHLEIMER: If that is your Honor's interpretation, I have no further question.

THE COURT: That is perfectly plain what counsel said.

MR. SCHLEIMER: He did not say it in so many words.

MR. IRWIN: The Government admits that no court order was obtained for the destruction of that liquor; that the collector of customs claims he destroyed that under Section 607 of the revised statutes, and other than the 5 cases that were held as evidence, there was no court order had.

MR. SCHLEIMER: May I ask you whether that was done after the filing of the libel in this proceeding?

MR. IRWIN: What was done?

MR. SCHLEIMER: The destruction of the liquor under the manner you just stated.

MR. IRWIN: Which liquor?

(Testimony of Charles W. Salter)

MR. SCHLEIMER: That which was seized on the boat.

MR. IRWIN: It is in the record that it was ordered destroyed on February 9th, 1933. By simple manner of mathematical calculation that is subsequent to the time the libel was filed.

MR. SCHLEIMER: The letter says September 13th, 1932.

MR. IRWIN: But this shows it was never actually destroyed until February 9th, 1933.

MR. SCHLEIMER: That is all.

REDIRECT EXAMINATION

In answer to MR. IRWIN:

The conversation between me and counsel about that liquor when he called at my office he wanted to have the liquor returned to him, because the boat was going to be returned to him. He had been directed by the court, as I recall it to—I don't know what the legal term would be, but to draw some conclusions of the court, and he wanted the liquor returned, and I told him, after consulting the records, that it had been destroyed, and then he suggested that a substitution could be made that would meet with his approval, in the event we had other types of liquor, and I told him that was out of the question entirely, and his further direction was that if he could not get the liquor for his client, he would bring an action against the Collector.

MR. IRWIN: That is all.

MR. SCHLEIMER: No further questions.

THE COURT: We will take a recess for five minutes.

(Witness excused.)

(Thereupon a five minute recess was taken.)

THE COURT: Are you ready to proceed?

MR. IRWIN: May it please the court, at this time, on behalf of the Libelant, I believe the points have been covered that were set forth in the Minute Order by your Honor. At this time the Government has no further evidence to offer.

MR. SCHLEIMER: At this time I offer in behalf of the Claimant and Respondent the judgement roll in the case of the United States of America against Frank Oreb, S. Hirota and T. Tomikawa, known as No. 10,898-H.

MR. IRWIN: To all of which objection is made on the ground it is immaterial and not having a proper foundation laid and immaterial to prove any of the issues in this action.

MR. SCHLEIMER: May it please the court, I have called the court's attention, in several briefs I have submitted, and I have urged right along that the court may take judicial notice of this judgement. Now, at this time, I offer in evidence the judgement roll so there will be no question that this has not been called specifically to the attention of the court.

THE COURT: The objection to the offer is sustained and an exception may be noted.

MR. SCHLEIMER: I ask that it be marked for identification.

THE COURT: Let it be marked as Claimant's Exhibit A for identification in this hearing.

The said exhibit was marked "A" for identification and consists of the following, to-wit:

Indictment, No. 10,898-H, filed on March 4, 1932, against T. Tomikawa, S. Hirata, and Frank Oreb. Said indictment is in three counts. (1) Conspiracy to import intoxicating liquors; (2) Conspiracy to violate the National Prohibition Act; and (3) Violation of the Custom Laws. Special appearance, objections to the jurisdiction of the court and motion to quash said indictment, filed May 16, 1932. Minute order made on May 20, 1932, overruling the objections made to the jurisdiction of the court and denying the motion to quash said indictment. Notice of motion, dated April 4, 1933, to set aside said minute order made on May 20, 1932, and to reopen said motion to quash said indictment and to quash said indictment. Said motion was based upon the affidavits of Toichi Tomikawa, Shinajira Hirata, Frank Oreb and Max Schleimer, all sworn to April 4, 1933, filed April 4, 1933, and was also based upon the evidence taken on the hearings in said libel proceeding, No. 5567-H, and minute order made in said libel proceeding on March 30, 1933. Said judgment roll also contains a minute order made on April 24, 1933, granting said motion to set aside minute order made on May 20, 1932, and reopening said motion to quash said indictment and quashing said indictment and exonerating the bail given by said defendants. Said judgment roll also contains a certificate of the clerk, dated June 2, 1933, to the effect that said judgment was entered in Law & Gen. Book 81 & 84, p. 158 & 993.

MR. SCHLEIMER: At this time, may it please the court there has been a slight misunderstanding here, and

I want to straighten it out now for once and all. There was a stipulation dated March 7, 1934. Your Honor will remember that a few days before March 7, 1934 the matter was on your Honor's calendar, and he ordered that the matter be continued for the purpose of taking proof as to the residence of the claimant, Toichi Tomikawa, and suggested in open court that counsel may get together and may agree to a stipulation, and may submit it to the court on that fact, and then it would not be necessary to take any other evidence. Mr. Irwin was present at that time, and we stepped out into the corridor and discussed that matter, and I told him what I proposed to insert in the stipulation, and he said he would sign it if I prepared such a stipulation. I prepared four copies of the stipulation, and had my client sign it, and on the 7th of March I contemplated to fly east to visit my sick son in the east, and I brought down three copies, the original and two carbon copies of the stipulation, and I explained the situation to your Honor's Secretary. She suggested that I leave those stipulations, and she would get in touch with Mr. Irwin, because I had been up in the District Attorney's office in the morning, and he was not there, and was not expected until late in the day. I left the stipulations there, and when I returned from the east I found that Mr. Irwin did not sign the stipulation, and I could not find the stipulations, and I communicated with the United States Attorney's office, and they said they did not know anything about it, and did not see anything about it, and the files did not show it, and finally one day I called on Mr. Utley and he sent for the file, and there, near the top of the file, I found the two stipulations. The third

one has never been found. However, I have the claimant here for the purpose of proving the actual facts that are included in that stipulation. My impression is that some part of it is in the record, but not all of it. Since your Honor called for it, and since we prepared that stipulation, I think the record should show that. Now, if Mr. Irwin will stipulate to the facts, well and good. If not, I have only about 6 or 7 questions to ask of the claimant, and I will ask the privilege to do so.

MR. IRWIN: To all of which, first of all I wonder if the court can rely on the statements as to my representation to Mr. Schleimer any more than we can as to his representation as to that court order being in the file this morning, made by Judge James, ordering the destruction of the liquor.

THE COURT: Right here, may we suggest we may make some progress if counsel will state whether or not such a stipulation will be entered into, and if not, it will be necessary to go ahead with the proof.

MR. IRWIN: No, your Honor, and I think I should say to your Honor, in all brevity, that I told Mr. Schleimer were a stipulation presented which covered the facts as I understood them, I would gladly consent to sign it. A stipulation sometime later reached my desk from your office, and *I* all I have to do is to present the stipulation to your Honor to show that I could not sign it.

THE COURT: In other words it did not contain the matters that you understood?

MR. IRWIN: Yes. And I called Mr. Schleimer's office, and he was in the east.

THE COURT: Go ahead with the evidence then.

MR. IRWIN: If it is proposed to follow the terms shown in that stipulation, I think I should be permitted to object at this time, because it will take the matter outside of some things that the Government bases *it's* claim on. This is outside of what your Honor's Minute Order shows. If your Honor will glance at that stipulation, the bottom ten lines, I think you will see.

THE COURT: In other words, that the court may be able to follow the position of counsel, Government counsel, with reference to the objection to the stipulation, suppose you indicate your understanding of what the stipulation was to contain. Can you do that?

MR. IRWIN: I can do that, your Honor. We were in open court here and my understanding was we would try and get together and agree on a stipulation of facts which would bring this matter down to save your Honor labor. There was no discussion of any particular facts, to my knowledge, to be included in that stipulation. All I received was one day that stipulation asking me to stipulate that this claimant was and has been for years past, domiciled and a resident of Japan. Now, Mr. Parker suggests that I withdraw my objection to this at this time, and go ahead with the proof.

THE COURT: Very well, go ahead with your proof, Mr. Schleimer.

MR. SCHLEIMER: Mr. Tomikawa, come forward.

(Testimony of Toichi Tomikawa)

TOICHI TOMIKAWA,

the Claimant called as a witness in his own behalf, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

In answer to MR. SCHLEIMER:

My name is Toichi Tomikawa. I am the claimant in this case. I was born December 1, 1891, in Japan, in the city of Osaka. My parents are Japanese. I am not an American citizen. I came to this country May 13, 1929, from Yokahoma, Japan. I had a passport when I came here. I have got that passport with me.

(Witness produces document and hands same to counsel.)

I am married. My wife's name is Sumi. I was married 13 years ago in Japan. I have one child, a boy, name Hiroshi. They live at No. 90 Ikadacho, Mishinomiya. That is the name of the city; province of Hyozo. That is in Japan?

Q And is that your domicile there?

A Yes, sir.

THE COURT: Now, just a minute. Let the answer go out. What is or is not a domicile, under this proceeding becomes a question of law.

BY MR. SCHLEIMER:

Q Is that where you live?

A Yes, sir.

Q That is your home?

A Yes, sir.

(Testimony of Toichi Tomikawa)

Q That is where your family lives?

A Yes, sir.

In answer to MR. SCHLEIMER:

I lived there more than 11 years now. I landed in San Pedro May 13, 1929. I have a place where I stay in San Pedro. It is 241-A Albicore Street.

THE COURT: How long have you been living at San Pedro?

THE WITNESS: Since I come from Japan.

BY MR. SCHLEIMER:

Q The Judge wants to know how long you lived in San Pedro?

A Since I come from Japan.

Q How many years is that?

A About five years.

Q Now, is that your permanent home in San Pedro, or is your permanent home in Japan?

MR. IRWIN: Object to that.

THE COURT: Let him answer.

THE WITNESS: In Japan.

BY MR. SCHLEIMER:

Q Japan is your permanent home?

A Yes, sir.

Q And you are staying there while you are in this country, is that right?

A Yes, sir, temporarily I am living—

Q In San Pedro while you are in this country, is that correct?

A Yes, sir.

(Testimony of Toichi Tomikawa)

In answer to THE COURT: I came to the United States May 13, 1929. I have not been back to Japan since then. I have been living in San Pedro, California since May of *1919*. I made my living since I came to the United States fishing. I have been in the fishing business sometime for myself and sometime for others. I have been in the fishing business all my life. Since I came to this country I do fishing and never do anything else. Since I arrived, I get the boat named Orient and started fishing. That was about October, 1928. I was in the United States in 1928. I sailed out in December of 1928 to Japan, and returned to this country with that passport next year, May 13, 1929. After I came back to the United States in May of 1929 I again went into the fishing business for myself. That is the only business I have been doing since May, 1929. After next year, January, we go to join another man and got San Lucas. I mean about January 1930 I joined another man as a partner. And the three of us went into the fishing business. One operated a boat; the name of that other boat was San Lucas. When we were not using that boat to fish we tied up at Fish Harbor, at San Pedro about half a year. Orient was 34 feet long and has Fairbanks-Morse 30 horse engine. Its tonnage, I think was about six or seven tons; that was the first boat that I operated after May, 1929. From May 29 I operated the Orient. I owned the Orient; she was about 40 feet long and 30 horsepower. Its tonnage was six or seven tons. When I was not fishing on that boat I kept the Orient tied up at San Pedro; the first boat that I operated after May, 1929 was the Orient and the next boat was the San Lucas.

(Testimony of Toichi Tomikawa)

We made order for San Lucas and it was all completed on September, 1930. And then I started to operate it. We operated the San Lucas that year and the next year. Next year, that is 1931, November, we get orders not to run out to any high sea boats to get the fish, and we tied up two or three months. That is the order from the cannery. The cannery gave me orders not to operate any more high sea boats, so I quit from November, 1931 until the spring of 1932. The two partners that I had operating the San Lucas were Japanese. One time after orders come from cannery, the fish price was going down, and so I quit the partnership in the boat in November, 1931; from November of 1931 until the Spring of 1932 I was working at Ensenada; Ensenada Cannery. I caught some fish for the cannery at Ensenada. It is a cannery boat that takes them, fishermen. I have a contract. I had a contract to supply fishermen to work on a boat belonging to the cannery at Ensenada, Mexico. I was supplying these men for the cannery until the spring of 1932. Spring is the time for sardines, so I sometimes come to this country to get supplies for the boys that are fishing, in the spring of 1932. In December of last year I come back to get them, and ever since that time I be in Ensenada. I mean in December of 1931 I came back to get some supplies for these fishermen working for the cannery at Ensenada. I bought the Patricia in March, 1932. In March, 1932 I bought this boat Patricia that was seized in connection with this lawsuit. I don't know exactly the date. I bought this boat at San Pedro from K. Ogawa. I repaired the Patricia's engine, some part of the engine was not in running condition, so I repaired

(Testimony of Toichi Tomikawa)

it. I had the engines repaired. It is 100 horsepower Fairbanks, C. O. type. I bought Patricia to capture sardines, and fix the side of the boat for catching sardines. I took the boat Patricia down to Ensenada; that's the main purpose I buy, and send it to Ensenada to make fishing in the future with the boys. The engine was in bad condition so we fix it. I bought the Patricia at San Pedro; then I went with the boat away from San Pedro; after I left San Pedro in March, 1932 I went to San Diego to get some nets from a friend of mine. I went to San Diego to get some net. I come back to San Pedro. Then I sailed with the boat from San Pedro to San Diego; I got some nets there at San Diego; then I started back from San Diego to come to San Pedro again. That my intention was to go to San Diego but before I go to San Diego the engine was wrong, and very strong west wind blew up, and we sail out to San Diego. So we happened about one day and the night floating, because engine condition isn't good.

The Court:

Q Let's see. On your way down from San Pedro to San Diego did the engines get out of order?

A Bad order.

Q Before you got to San Diego?

A Yes, sir.

Q And the boat floated around for about a day and a night?

A Yes.

Q And then did you finally get to San Diego?

A No, I suppose it is away from San Diego, we couldn't see the mainland exactly.

(Testimony of Toichi Tomikawa)

Q While the boat was at sea, on the way from San Pedro to San Diego, did the engines get out of order?

A Yes, but that is the condition we suppose we can repair.

Q You tried to repair it at sea?

A Yes, sir.

Q Well, now, after you repaired it at sea what did you do with the boat?

A We tried to get the engine in good condition.

Q Where did you take the boat?

A From the point where the engine stopped, we tried to come back to San Pedro.

Q Well, did you ever take this boat to San Diego?

A Never in there, no.

Q You never got into San Diego with this boat?

A No.

Q Then you never got these nets from your friend in San Diego?

A No.

Q But while you were on your way from San Pedro to San Diego the engines got out of order, is that right?

A Yes, sir.

A And you tried to fix the engines?

A Yes, sir.

Q And then, instead of going on to San Diego, you started to come back to San Pedro, is that right?

A Yes, sir.

Q And while you were on your way back from there to San Pedro the Customs Guard seized your boat?

A Yes, sir.

(Testimony of Toichi Tomikawa)

Q That is when it happened, is it?

A Yes, sir.

Q Well, where did you get this liquor that was on the boat?

A I never saw it in my life, the boat come up to us.

Q I don't think we understand you. Do you remember the Coast Guard Officer came on your boat?

A Yes, sir.

Q And do you remember the Coast Guard found about 1,749 cases of liquor on the boat? Do you remember that?

A I don't know how many cases of liquor was loaded.

Q Well, there were a lot of cases of liquor on the boat?

A Yes.

Q Do you remember the Coast Guard officer found them in the boat?

A Yes, Sir.

Q Where was that liquor put on the boat?

A About two hours distance where he seized the boat. That is the place another boat tried to make room on that boat, because that boat almost sinking down, so much overloaded.

Q Do you mean about two hours before the Coast Guard *sized* you?

A No, two hours distance from the point where the Coast Guard seized us. That means between ten and fifteen miles south from that place.

MR. SCHLEIMER: He says two hours travelling from the place where the Coast Guard seized the boat.

(Testimony of Toichi Tomikawa)

THE WITNESS: That's the place where our engines stopped.

THE COURT: While you were stopped at sea another boat came alongside with some liquor?

A Yes, sir. I don't know what it was. It was early morning and couldn't see very well.

Q Another boat came along and stopped alongside of your boat?

A Yes, sir.

Q All right; now then, what happened when the other boat came alongside of your boat?

A Overloaded, so want us to help.

Q Do you mean somebody on the other boat said they were overloaded, and that they were afraid their boat was going to sink?

A Yes, sir.

Q And they wanted you to help them, take some of the cargo off of their boat?

A Yes, sir.

Q And you agreed to help them take some of the cargo off of their boat and put it on your boat?

A Before I say yes or no they tried to make load while the boats are rocking. So I couldn't refuse, I didn't have any gun.

Q You did not have any gun on your boat?

A Nothing.

Q Did they tie this boat alongside of your boat?

A Yes, sir.

(Testimony of Toichi Tomikawa)

Q And while the two boats were tied together they carried some of their cargo from their boat onto your boat?

A Yes, sir.

Q And that is the cargo which the Coast Guard Officer found on your boat, is that right?

A Yes, sir.

Q Now, this other party on this other boat told you he was afraid that their boat would sink?

A Yes, sir.

Q What did he tell you to do with the liquor?

A Keep it about the same place and "I will come back the next night." That is what he say. "We know this boat, so if you go anywhere we can get you. So keep this place until we come back next night."

Q Now, how long before the Coast Guard Officer seized your boat did they put this cargo on your boat? How long before?

A The same morning early.

Q The same morning early?

A Yes.

Q And when these people came, these people on this other boat came alongside of your boat, before they put any cargo on, you were on your way back to San Pedro, is that right?

A Yes, sir.

Q And then after they put this cargo from the other boat onto your boat, what did you do with your boat?

A We tried to keep the same pace, so we do not run the engine, and float a long time, until eleven o'clock the same day in the morning.

(Testimony of Toichi Tomikawa)

Q Well now, after the other boat left you did not have to stay there did you?

A I didn't run the engine at all after they loaded.

Q Did you know the people on this other boat?

A Never know them.

Q All right, so after they left you, why didn't you come on back to where you were going, to San Pedro? What were you afraid of then?

A Afraid of these people.

Q What?

A I afraid of these people.

Q You were afraid of them when they were not there near you?

A I afraid the people of the boat, the other boat.

Q Well, they were gone, there wasn't anything to be afraid of after they were gone was there?

A But the Patricia can't hide, so when they look around for me they can find out easy. You see they say, "You do nothing and say nothing."

Q Now, when the Coast Guard Officer came on your boat did you tell him that you were afraid of the people on another boat?

A They didn't ask some questions.

Q Well, did you tell them where you got this cargo that was on your boat, did you explain that to the Coast Guard Officer?

A Yes.

Q What did you tell him?

A That is more than three years and a half ago, and don't remember maybe what I said. But when they coming, they excited themselves, and tie up the boat.

(Testimony of Toichi Tomikawa)

Q Well now, when you were with the Coast Guard Officer were you afraid of anybody else?

A Well, I afraid of anybody come to us.

Q Well now, did you ever hear any more from these other people?

A No.

Q Nobody else ever came to see you about this other cargo?

A No.

Q And these people that you say you were afraid of, on the other boat, you have never seen them any more?

A No.

Q Never heard from them any more?

A No.

Q Are you still afraid of them?

A I don't know what I may say.

Q Well, after the Coast Guard Officer seized your boat and took this cargo, why then didn't you tell the officers about this story of them stopping you on the high sea and putting their cargo on your boat, why didn't you tell them then?

A They didn't ask me.

Q You knew you were arrested, didn't you?

A Yes.

Q You knew you were liable to get in trouble didn't you, didn't you know that?

A Yes, sir.

Q To protect yourself why didn't you tell the Officers how this cargo got onto your boat?

A All of these people excited, they never ask me, and no chance to explain this until today.

(Testimony of Toichi Tomikawa)

MR. SCHLEIMER: Just a moment, I want to ask one question.

MR. IRWIN: I haven't had any cross examination yet.

MR. SCHLEIMER: Just one or two questions.

THE COURT: Go ahead, Mr. Schleimer.

BY MR. SCHLEIMER:

Q When the Coast Guard people got on board, did they have guns in their hands?

A Yes.

Q And did they put them up against you and take you off, on the other boat?

A Yes, sir.

Q Did they allow you to talk to them?

A Oh yes, they excited themselves with guns.

Q Listen to me. Did you talk to the Coast Guard men, did they allow you to talk to them?

A I didn't trust any people.

Q What do you mean by that?

A So I keep quiet, as they say.

Q But I am asking you, did you want to talk to the Coast Guard people, did they let you talk to them?

A No, I didn't ask.

Q They wouldn't let you talk?

A They excited.

Q They were excited. Now, when these people on the high seas came over with their boat and tied their boat to yours did they say anything about paying you for keeping the liquor on board?

A No, I didn't hear anything about it.

(Testimony of Toichi Tomikawa)

Q You didn't say anything about it?

A I like to save my life.

Q You liked to save your life?

A Yes.

Q You were afraid?

A Yes, sir.

Q How far out to sea was that?

A From where?

Q From the nearest point to any coast of the United States?

A I suppose 15 miles.

Q How much?

A Fifteen miles.

Q Fifteen miles?

A From shore of the United States. That is almost south of San Pedro.

Q When you said 15 miles, what did you mean by that.

A Fifteen miles distance from the nearest, from the land of the United States.

Q Was that the place where the Coast Guard seized the boat?

MR. IRWIN: I object to this line of questions. This man has not been qualified as an expert navigator.

THE COURT: Let him go ahead.

MR. SCHLEIMER: I have no further questions. You may cross examine.

(Testimony of Toichi Tomikawa)

CROSS-EXAMINATION

BY MR. IRWIN:

Q How long had you lived in this country before you went back to Japan in 1928?

A I think five years I stayed before I sailed out the second time.

Q Before you what?

A Before I sail out in 1928.

THE COURT: Do you mean you had been living in the United States about five years before you went back to Japan in 1928?

THE WITNESS: Yes, sir.

BY MR. IRWIN:

Q What business were you in during that five years, fishing?

A Yes, sir.

THE COURT: Where were you living during those 5 years?

THE WITNESS: The same place, Terminal Island.

THE COURT: That is San Pedro, isn't it?

A Yes, sir.

BY MR. IRWIN:

Q Were you in the fishing business in Japan?

A No, I was too young to do that.

Q You have only been in the fishing business in this country?

A Yes, sir.

(Testimony of Toichi Tomikawa)

Q Did you live at San Pedro all the time you have been in the fishing business?

A Yes, sir.

Q You remember being on the stand here in this court, before, don't you?

THE COURT: Don't ask him that, we know he was.

BY MR. IRWIN:

Q Do you read English, Mr. Tomikawa?

A A little.

Q You were asked these questions before:

"How long have you been a master on a vessel," and you said "What boat?"

"Q Beg pardon?"

"A What boat?

"Q Any boat on the coast here." and you said, "I have been fishing more than 15 years operating boats, and I was, on it, the master and operator my own self." Is that a fact?

A Yes, sir.

Q Is it true that you let the boat drift all that day?

A Yes, sir.

Q Then you never saw this cargo of liquor before that morning, is that right? You never saw the liquor until this other boat asked you to take it on your boat, is that right?

A Oh no, we never, because I didn't see what they had in that sacks, but by the smell I know what it was.

Q You never saw those sacks before that morning, is that right?

A No, I never know.

(Testimony of Toichi Tomikawa)

Q And they were not yours were they?

MR. SCHLEIMER: One moment please. I object to the question on the ground it is incompetent, irrelevant and immaterial and not within the issues, and on the further ground that as the master of the boat, they were placed in his possession, and he has certain rights in the cargo, certain privileges and certain titles. That is a question of law and not for the witness to interpret.

MR. IRWIN: This is the Claimant of this cargo, and he is claiming he was just keeping it and was going to drift there over night until they came back for it the next day.

THE COURT: He may answer.

MR. SCHLEIMER: Exception.

BY MR. IRWIN:

Q Did you understand my question, Mr. Tomikawa? Those sacks that were transferred to your boat did not belong to you, did they?

MR. SCHLEIMER: Same objection.

THE COURT: The witness may answer.

MR. SCHLEIMER: Exception.

BY MR. IRWIN:

Q What is your answer?

(Question is read by the reporter.)

A Well, any article an owner put on the deck of the boat belongs to the Captain.

Q Who told you that?

A I know that.

THE COURT: The people from the other boat did not give you any of this cargo, did they?

(Testimony of Toichi Tomikawa)

THE WITNESS: No.

Q They did not tell you to keep it, did they?

A Yes.

Q What did they tell you to do with it?

A They want to keep the same place, to keep the cargo.

Q They told you they were coming back to take it away from you, didn't they?

A Yes, they told they want to keep this cargo until they come back.

Q And you were willing to wait there and let them take it away again, weren't you?

A I am not willing.

Q Well, you say you stayed there for the purpose of having them come back and take it away?

A Yes.

Q You did not want to keep any of it?

MR. IRWIN: May the record show the witness shaking his head no.

THE COURT: Did you intend to let these men take that cargo away if they came back?

A Yes.

Q You were not going to keep any of it?

A I like to get out of this trouble. That is what I like.

Q Well now, when the men put this cargo on your boat did you know what it was, did you know it was liquor?

A No, I did not know, only what he told us.

(Testimony of Toichi Tomikawa)

Q After the men on the other boat went away did you find out that the cargo consisted of liquor?

A Yes, he told. I didn't open the hatch.

Q What's that?

A I didn't open the hatch, so I didn't know. But I suppose by smell.

Q Oh, you could smell that it was liquor, is that right?

A But I didn't see.

Q After the men put the liquors on the boat you could smell that it was liquor, even though you didn't go down and examine it, you could smell it was liquor, couldn't you?

A Yes, can't tell.

Q You couldn't tell what size it was. They put it on the boat that morning?

A They load themselves.

Q After they went away you could smell the liquors on the boat?

A Yes, sir.

Q Is that when you decided that you might get in to trouble, if you had that?

A Well, on high seas any American has no right to attack us on the high sea, so I keep the place on the high sea.

Q When did you think that you might get into trouble over this cargo? When did you think that you would get into trouble over the cargo? You said a little while ago that you were afraid that you might get into trouble over this cargo?

A Yes, sir.

(Testimony of Toichi Tomikawa)

Q When did you make up your mind that you might get into trouble over the cargo?

A I don't get what you mean.

MR. SCHLEIMER:: The judge wants to know, you told the judge before that you were afraid that you would get into trouble.

THE WITNESS: Yes, sir.

Q The judge wants to know when did you make up your mind, when did you decide that you might get into trouble?

A I don't know what you said.

Q Well, you told the judge you were afraid of these people, that you would get into trouble.

A Yes.

Q When did that happen, when you were afraid?

A Since they loaded it.

Q Since when?

A Since they loaded the cargo on the Patricia.

Q At that time you became afraid?

A Yes, sir.

Q Is that it?

A Yes, sir.

Q Was it at that time that you became afraid?

A Yes, sir.

MR. SCHLEIMER: Does that answer your Honor's question?

THE COURT: Yes.

BY MR. SCHLEIMER::

Q Now, did you intend to bring the cargo with the liquor to San Pedro? Listen to me, what I am asking

you. After the liquor was on the Patricia, did you intend to bring that to San Pedro?

A What for?

Q I am asking you did you intend to do that or did you intend to stay out there?

A I had no intent to approach the main land.

Q What was your intention?

A My intention to keep the boat about the same place.

THE COURT: How long did you intend to stay there?

A Until the next night that they talked to me you see.

BY MR. SCHLEIMER:

Q What do you mean by that? They told you they would come back the next night?

A Yes.

Q So you expected to stay there. Now, while you were out at sea there were your engines in the boat running, or was your boat drifting?

A At that time just running the air compressor.

Q How about the engines?

A Engines not start. We lose the air to start the engine, so we start the air compressor with very small engine.

Q Were you drifting at that time?

A Yes, sir.

Q Which way was the tide going?

A Southeast.

Q How was the weather?

A That night was blowing west.

Q I am talking of the condition of the weather.

A Weather was not clear.

(Testimony of Toichi Tomikawa)

Q Now then, when they put the cargo on your vessel how far were you from the nearest coast land?

A We are running usually about 15 miles from the beach.

MR. SCHLEIMER: That is all.

BY MR. IRWIN:

Q How much did you pay for the Patricia?

A Eight thousand dollars.

Q How much was that?

A Eight thousand dollars.

Q And did you pay cash for that?

A Yes, sir.

Q That was in March of 1932, March 10, 1932?

A About, I don't remember exactly the date.

MR. IRWIN: That is all.

THE COURT: What was the tonnage of the Patricia?

A I think she carried about 43 tons.

MR. SCHLEIMER: Your Honor has the expert's affidavit in the record as to the length of it, and tonnage and everything.

THE COURT: That is already in the record?

MR. SCHLEIMER: Yes, that was at the time your Honor opened the case on my motion for that purpose of showing that in the record.

THE COURT: That is all.

MR. SCHLEIMER: I will take the stand.

(Witness excused.)

(Testimony of Max Schleimer)

MAX SCHLEIMER,

called as a witness in behalf of the Claimant and Respondent, having been first duly sworn, testified as follows:

THE WITNESS: My name is Max Schleimer. Do you want me to put questions or make a statement, Mr. Irwin?

MR. IRWIN: I want to call the court's attention to the rule in the Federal Courts that when an attorney testifies in the case pending before the court, he can make no further arguments before your Honor.

THE COURT: That may apply to oral arguments, but he can give us a memorandum and citations.

MR. IRWIN: Yes, I just as soon you make a statement.

THE WITNESS: If there are any objections I will interrupt. The statement that I wanted to make is that I called on the Assistant Collector for the purpose of ascertaining where the cargo was stored, because I tried to get the information in the main office. So he sent for the record and he asked for what purpose I wanted the information, and I said that I wanted to use it for the purpose of preparing my findings, and he sent for the record and told me that the—

MR. IRWIN: (Interrupting) Just a moment. I am going to object to the further statement about this matter at this time, inasmuch as it was offered for impeachment, because there was no proper foundation laid in that the time of this alleged visit has not been set

(Testimony of Max Schleimer)

forth, and particularly I think we might be favored with the time element.

THE COURT: Well, you might look at the file.

THE WITNESS: I could not recall it. That was the time that the assistant collector on the stand testified that I had the first interview. I never had an interview or saw him in my life before. I can not recall the date.

THE COURT: Can you tell whether it was in 1932 or in 1933?

A To the best of my recollection it was after your Honor had made a minute order in which you ordered judgment for the Respondent and Claimant. It was after that, and it was sometime before I prepared the proposed findings. I never asked him for the return of the cargo. All I asked him was to give me the information as to how many sacks there were, and the nature of the liquor, and where they were stored, so that I could insert that in the findings. And at that conversation he told me the liquor had been destroyed, and I asked him by what authority.

MR. IRWIN: May it be understood that pending the determination of the date, inasmuch as it is direct impeachment of the Assistant Collector's testimony, my objection goes to it.

THE WITNESS: He said I demanded a return, and I deny that I demanded a return. I wanted to know where it was stored.

THE COURT: The record here shows that under date of March 30th, 1933 a Minute Order was made vacating the previous order, or denying the motion of Claimant and Respondent to quash and dismiss the pro-

(Testimony of Max Schleimer)

ceedings and directing that the libel against the vessel be dismissed.

THE WITNESS: I believe my best recollection is it was shortly after this order.

THE COURT: Do you think then sometime in April of 1933 you had a conversation with Mr. Salter?

A Yes, sir.

Q In his office here in this building?

A Right on this floor, right in here.

Q Anyone else present besides Mr. Salter, and yourself?

A No. He rang the bell and some gentleman appeared, a clerk, and he directed him to bring him the file, and he brought in the file, and my best recollection is that later in the conversation this gentleman sitting at the end of the table was sent for, and he came to his office. Now, at that time I asked where the liquor was stored, and he said the liquors were stored in the Collector of Custom's warehouse, and it was destroyed, and I asked him by what authority he did so, because the liquor was a part of this litigation, and I relied upon that.

THE COURT: Do you mean this was what you told him?

A Yes. And he said before they destroyed the liquor they had a conference with, he said he believed it was Mr. Chichester in the District Attorney's office, and it was with his knowledge. We had some further conversation about advertisement, etc., and I told him at that time that I did not believe that they were acting in good faith when they knew that the cargo was a part of the litigation in this proceeding. That was the substance of the conversation.

(Testimony of Max Schleimer)

CROSS-EXAMINATION

BY MR. IRWIN:

Q What did he say to that?

A He said that regardless of the pendency of the action that he thought he had authority under the statute to destroy the liquors, and I disagreed with him.

Q Did he say under the 1930 Tariff Act?

A I don't recall, but he mentioned some tariff act, and I told him I thought it would be a fraud upon the court, and it would be a fraud upon the Claimant if he did so.

Q In other words you just had a difference of your interpretation of the law?

A That's it. Not only a difference in interpretation, but he lulled me and my client and everybody else into the belief that the liquor would be held pending this litigation.

Q You have had a good deal of experience in libel matters?

A I don't know what you mean by that.

Q You specialize in admiralty law?

A I don't know as I have. This is the first libel experience I have had.

Q Did you ever post a bond on behalf of your client for the liquor here?

A This was done behind the stage, so to speak, and therefore, we were not notified to file a claim, because we were lulled to believe that the cargo would be determined in this action, and the bill of information, the original and the amended bill of information shows that upon its face.

(Testimony of Max Schleimer)

MR. IRWIN: Just a moment, I ask that that go out as unresponsive. I asked him if he ever filed a claim and posted a bond with the collector of customs.

THE COURT: Yes, that answer may go out.

THE WITNESS: I did not file a claim because we did not know that they were taking any other proceedings except the proceeding that was pending in court, and we were led to believe that the cargo was being adjudicated in this action, and therefore, we paid no further attention, because we knew nothing about it.

THE COURT: Now, when you say that you were led to believe, as you just cited, do you mean led to believe by what you read in the recitals set forth in the libel?

A Yes, sir.

Q Not by reason of anything anybody else told you?

A No, sir. The face of the libel of information conveyed to us the information that this litigation is for the purpose of the cargo and the vessel, and the amended libel of information, which was filed long after the matter was heard before your Honor, and long after the alleged destruction of the liquor, contained an allegation to the same thing, the cargo and the vessel, and no intimation was made that the action did not involve the cargo as well as the vessel, until long after the judgment was entered.

BY MR. IRWIN:

Q Now then, may I direct the court's attention to the petition to quash and all proceedings based thereon, which was filed May 23, 1932, by Mr. Schleimer, the first pro-

(Testimony of Max Schleimer)

ceedings after his special appearance, in paragraph 2 he states:

"That your Petitioner is the Claimant of the 'Patricia' herein, and appears specially and solely for the purpose of objecting to the jurisdiction of this court, and not intending to submit himself and the said vessel to the jurisdiction of this court, as a party thereto," etc.

THE WITNESS: Because of the fact the libel of information on its face shows that this action involved the vessel and the cargo.

Q Did you examine the monition?

A No, I have never examined it until this morning, when you read it, and that involved the cargo as well.

By Mr. Irwin: That is a matter for the court to determine, I am speaking of the return on the monition.

A You are speaking of the monition, and that involved the cargo.

Q Did you ever examine the return on the monition?

A No, not until now.

THE COURT: Now, in any of the papers filed in this libel proceeding has a claim been filed on behalf of Mr. Tomikawa as against the cargo of liquor?

A In this way: I can't answer it any other way: That the claim was in an answer and the various documents that I pointed out to your Honor in one of my memorandums and the phraseology that I have used, which in my opinion I thought was sufficient, because of the fact that a criminal action was pending. I have not got that brief before me, but your Honor has my original brief, and the documents are enumerated there, and the language used. We filed a stipulation for costs, and that

(Testimony of Max Schleimer)

stipulation for costs is the usual form, and states the filing of a claim, and therefore, as a matter of law, we are estopped from disputing that.

Mr. IRWIN: May it please the court, may I direct your Honor's attention to the preamble of the answer of the claimant filed as late as October 17, 1932, entitled: "To the Honorable Judges of the District Court of the Southern District of California:

"Toichi Tomikawa, owner and claimant of the Oil Screw Vessel 'Patricia', her engines, tackle, apparel, furniture, etc., as the same are proceeded against on the libel of complaint in the above entitled action, answers said libel of complaint as follows."

There is no mention there of the cargo. It is true that on page 3 of the answer, commencing at line 1, he refers to the libel and "except that on March 23rd, 1932 the agents of the United States Coast Guard seized the Oil Screw Vessel 'Patricia', her engines, tackle, apparel, furniture, etc., and everything that was on board of said vessel," and so on.

THE WITNESS: In one of my several briefs that I submitted to the court I stated that if these documents that I have indicated do not constitute a claim under the statute, that I ask permission of the court to file a claim nunc pro tunc, etc., and your Honor has not made any ruling on my request.

THE COURT: Mr. Reporter, read that statement.

(The last statement of the witness was read by the reporter.)

THE WITNESS: In other words, I pointed out to your Honor the various documents and how I used the

(Testimony of Max Schleimer)

phraseology, and the stipulation for costs, and I then stated that if the court should decide that that is not a sufficient claim that I ask permission to file a claim nunc pro tunc. I urged also that since—

MR. IRWIN: (Interruping) Just a moment, counsel took the stand to testify. Is this supposed to be in the matter of evidence?

THE COURT: Well, have you finished with the testimony?

MR. SCHLEIMER: Yes, your Honor.

THE COURT: Very well.

MR. SCHLEIMER: May I address the court?

THE COURT: Just a moment.

(Witness excused.)

THE COURT: Now, in addition to the libel or amended libel and the answer thereto, let the record show that there is incorporated as a part of the record of this hearing, the special appearance made on behalf of Toichi Tomikawa filed May 23rd, 1932 with Notice of Special Appearance, filed under the same date, the petition to quash seizure and all process and proceedings based thereon, filed on the same date; the Objection to Jurisdiction and Motion to quash seizure and to dismiss proceedings, filed on the same date.

Now, what is it Mr. Schleimer?

MR. SCHLEIMER: I wanted to call your Honor's attention to the last brief which was filed by Mr. Irwin, and he says, on page 3, line 13, commencing at line 13:

"In Claimant's response he says, with reference to this finding 9, that in a stipulation for costs that he filed, it was recited, 'Whereas a claim has been filed in said cause by' Claimant."

(Testimony of Max Schleimer)

Now, the specific point comes, now we have never—

MR. IRWIN: (Interrupting) I don't know what we are arguing about.

THE COURT: Counsel is making a statement to the court. Let's hear it.

MR. SCHLEIMER: (Reading): "We have never made any objection to the fact that he filed a claim in this proceeding. If he had not there would have been no proceeding. What we are contending is that he never filed a claim for the cargo, either before this court or before the Collector of Customs, and the Marshal never seized the cargo, and therefore, this court has no jurisdiction."

What I am trying to point out to your Honor is this, that we went to trial, and no objection was made and no contention was made by the Government that we did not file a claim until long after the judgment was entered, dismissing the libel, and directing the return of the cargo and the vessel to us. Long after that. Then Mr. Irwin comes along and makes this statement after I have pointed out to your Honor in the briefs and various documents the language which I contend is a sufficient claim, and in the same document I ask your Honor to consider that if you, in your wisdom, think this is not sufficient, to permit us to file a claim nunc pro tunc. Although personally I do not think it is necessary, in view of the fact that such objection was not made under the rules.

THE COURT: Now then, have we concluded with the introduction of the evidence?

MR. SCHLEIMER: I have introduced all in my client's behalf.

(Testimony of A. S. Minick)

THE COURT: Has the Government any further evidence?

MR. IRWIN: One short witness, yes, your Honor.

THE COURT: You may proceed.

MR. IRWIN: Mr. Minick, take the stand.

A. S. MINICK,

called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

THE CLERK: State your name, please.

THE WITNESS: A. S. Minick.

DIRECT EXAMINATION

BY MR. IRWIN:

Q What is your occupation?

A Deputy United States Marshal.

Q And did you occupy that position in June of 1930?

A I did.

Q How long have you been in the United States Marshal's office?

A Since February, 1918.

Q Do you know the boat "Patricia"?

A Yes, I do.

Q The one that is now in the custody of your office?

A Yes, sir.

Q And is the subject of this proceeding?

A I do.

Q Have you seen that boat since it has been involved in this proceeding?

A I have.

Q Did you ever see that boat before?

A I had.

(Testimony of A. S. Minick)

MR. SCHLEIMER: I object to that, your Honor, we have gone over that two times, to my knowledge, and it is in the record, and I know just what they are going to offer.

THE COURT. Let's go ahead and get through with it.

BY MR. IRWIN:

Q I direct your attention to a Marshal's return in case 4024-C, dated June 20th, 1930, and to the signature Deputy Marshal, is that your signature?

A Yes, sir.

Q And is that return made by you?

A It is.

MR. IRWIN: I offer in evidence Marshal's return of case No. 4024-C.

MR. SCHLEIMER: I object to it upon the ground it is incompetent, not within the issue, there is no allegation in the libel of information of what they are seeking to introduce now, and not in the amended libel, and no reply having been interposed or any pleading whatsoever. My recollection is the same record has been offered heretofore, and your Honor has excluded it at that time. That is my best recollection.

THE COURT: Let's see that.

MR. IRWIN: Yes, your Honor. (Handing document to the court.)

THE COURT: What is the purpose of offering this into the record?

MR. IRWIN: The purpose is this: The Claimant's motion to suppress the libel and quash the seizure and their objection is the fact that the boat, they claim, is Japanese owned, built for Japanese, as I understand it,

(Testimony of A. S. Minick)

and owned by Japanese, and this is to show a break in the title, whereby even if it was claimed that this boat was held by Japanese, that it is the subject for forfeiture and within the jurisdiction of that court, when it has been held by any other than a Japanese, and that return of the Marshal showing a sale of the boat, defeats that.

MR. SCHLEIMER: You cross-examined the Chief Clerk, I believe it was, of the Customs Office at San Pedro, when he had the original records, the registration cards and all the data and the chain of title was proved through him at that time. We know nothing about this record except that they offered it once before on one of these hearings, and your Honor excluded it at that time.

THE COURT: Well, if it is disputed that on or about June 20th, 1923 that this vessel had been—the confusion arises from the fact that the date of the signature of the witness appears to be the year reading 19230; it is apparent, however, when one examines the document in its entirety that there is a clerical error in failing to type the figure 3 over the figure 2. It is obvious a clerical error.

MR. SCHLEIMER: As I understand, your Honor, this case was libel for services.

MR. IRWIN: Before beginning my offer, or urging my offer, I would like to ask one further qualifying question.

BY MR. IRWIN:

Q Mr. Minick, do you recall the boat upon which you serviced this monition on June 30th, the boat "Patricia," do you recall that boat?

A The boat I sold, yes.

(Testimony of A. S. Minick)

Q Have you an opinion as to whether or not that boat under this case No. 4024-C and the "Patricia" in the instant case, which you have examined since it has been in the custody of your office, is one and the same boat?

A To the best of my knowledge it is one and the same boat.

Q And pursuant to and subsequent to the Marshal's return made in case No. 4024-C can you determine from an examination of this record whether or not that boat "Patricia" was sold?

A Yes, I can.

Q And was it?

A It was sold, yes.

Q Can you give us the date of this sale?

A. The date of the sale was June 20, 1930.

Q And sold to whom? One Homer Pitner?

A Yes.

MR. IRWIN: At this time, may it please the court, I renew my offer in evidence of the return by the Marshal in case No. 4024-C under date of June 23rd, 1930, of the venditioni exponas.

THE COURT: That would be the writ itself, before the return.

MR. IRWIN: I offer the writ and the return.

MR. SCHLEIMER: Objected to as incompetent, irrelevant and immaterial and not binding upon the respondent and claimant, and upon the further ground it was heretofore offered in evidence and was excluded by the court.

THE COURT: Objection overruled and exception may be noted, and the document may be received in evidence and marked Government's Exhibit 5 of this date.

(Testimony of A. S. Minick)

[Gov. Exhibit No. 5 on Hearing Filed 8-7-1934.]

UNITED STATES OF AMERICA }
SOUTHERN DISTRICT OF CALIFORNIA } ss:

The President of the United States of America

To the Marshal of the United States for the Southern District of California, GREETING:

Whereas, a Libel was filed in the District Court of the United States for the Southern District of California, on the 22nd day of May, in the year of our Lord one thousand nine hundred and thirty by Matt J. Walsh and Frank E. Garbutt, doing business under the firm name and style of Garbutt-Walsh, Marine Hardware Company, a California corporation, and Fellows & Stewart Inc., a California corporation, against the Boat "Patricia" her engines, furniture, etc., and the owners thereof, and O. Uyemoto and K. Uyejui and praying that the same may be condemned and sold to answer the prayer of the said libellants;

And whereas, the said Boat has been attached by the process issued out of the said District Court, in pursuance of the said Libel, and is, now in custody by virtue thereof; and such proceedings have been thereupon had, that by the sentence and decree of the said Court, in this cause made and pronounced, on the 10th day of June, 1930, the said Boat ordered to be sold by you, the said Marshal, after giving 6 days notice of such sale, according to law. And that you have the moneys arising from such sale, together with this writ, at a District Court of the United States, to be held for the Southern District of California,

(Testimony of A. S. Minick)

at the City of Los Angeles, on or before the 25th day of June, 1930, and that you then pay the same to the Clerk of the Court;

Therefore, you, the said Marshal, are hereby commanded to cause the said Boat so ordered to be sold, to be sold in manner and form, upon the notice, and at the time and place by law required. And that you have and pay the moneys arising from such sale pursuant to the aforesaid order or decree:

AND HAVE YOU THEN AND THERE THIS WRIT.

Witness, the HON. GEORGE COSGRAVE, Judge of said Court, at the city of Los Angeles, in the Southern District of California, this 11th day of June, in the year of our Lord one thousand nine hundred and thirty and of our Independence the one hundred and fifty-fourth

R. S. ZIMMERMAN
Clerk.

(SEAL) By EDMUND L. SMITH
Deputy Clerk.

MARSHAL'S RETURN

In obedience to the above Precept, I have sold the Boat "PATRICIA" to Homer Pitner, 311 Calif. St., San Francisco and such sale amounts to Fifty-One Hundred ($5100.00) Dollars which sum I have paid to the Clerk of this Court, as I am above commanded.

Dated this 20th day of June, A. D. 1930.

A. C. SITTEL, U. S. Marshal.
By A. S. MENICK, Deputy Marshal.

(Testimony of A. S. Minick)

BY MR. IRWIN:

Q I will ask you, Mr. Minick, if you saw the Mr. Pitner, to whom that boat was sold in 1930, which you have identified as the "Patricia"?

A Yes, I did, he was at the sale.

Q Have you had occasion to observe members of the Japanese race from time to time?

MR SCHLEIMER: Objected to as incompetent, irrelevant and immaterial and not binding on the respondent and claimant, and furthermore, such evidence was offered and excluded on the previous hearing.

THE COURT: You may answer.

MR. SCHLEIMER: Exception.

THE WITNESS: Yes, I have.

BY MR. IRWIN:

Q Do you know whether or not Mr. Pitner was a Japanese?

MR. SCHLEIMER: Objected to as irrelevant and immaterial and not binding on the respondent and claimant.

THE COURT: You may answer.

MR. SCHLEIMER: Exception.

THE WITNESS: He was not.

MR. IRWIN: That is all.

THE COURT: The man to whom you sold this boat was a member of the white or Caucasian race?

A Yes, he was.

(Testimony of A. S. Minick)

CROSS-EXAMINATION

BY MR. SCHLEIMER:

Q As a matter of fact, the sale which you conducted was for the purpose of the record only, and as a matter of fact K. Ogawa became the owner of the vessel, is that not so?

MR. IRWIN: Objected to as calling for a conclusion and no proper foundation laid.

THE COURT: Do you anything about what happened after you sold the boat to this Pitner?

THE WITNESS: No, I don't. Mr. Pitner, as I recall, came from San Francisco, and bid and he had a letter of credit from some bank in San Pedro, and he presented that letter to the bank at San Pedro, which was where he obtained a cashier's check for the payment of the boat.

BY MR. SCHLEIMER:

Q Is it not a fact at that time K. Ogawa registered the boat in his name in the Customs Collector's office as a Japanese vessel owned by a Japanese?

MR. IRWIN: Objected to as not proper cross-examination and no proper foundation laid, and it has not been shown that this witness knows.

THE COURT: If you have knowledge of that, Mr. Minick, you may answer.

THE WITNESS: I do not know.

MR. SCHLEIMER: That is all.

MR. IRWIN: That is all

(Witness excused.)

THE COURT: Is there any further evidence?

MR. IRWIN: No, your Honor.

THE COURT: Now, we noticed a number of books that you have there, Mr. Schleimer. Are those cases that are cited in the memorandum submitted to the court?

MR. SCHLEIMER: No. I propose to show, on the question of where there is no issue in the libel of information evidence could not be taken nor can any findings be made. Now, my contention is this—

THE COURT: (Interrupting) Well, it is almost 5 o'clock and the fact of the matter is we have had a very long and hard day. As you know, we were in session until considerably after twelve o'clock.

MR. SCHLEIMER: That is right.

THE COURT: If you will just call off those citations, we will undertake to examine them.

MR. SCHLEIMER: Osage Oil & Refining Company vs Continental Oil Company.

THE COURT: Where is it reported?

MR. SCHLEIMER: 34 Fed. (2d) 585, and at page 588, commencing with the black numbers 4 and 5.

THE COURT: Yes.

MR. SCHLEIMER: United States vs Goldstein, 271 Fed. 838, at page 845. The 4th paragraph from the top. Second Poole Company, vs Peoples' Coal Company, 188 Fed., 892, page 895, commencing with the black type figure 2. Hendryx vs Perkins, 114 Fed. 801, page 806. The last paragraph on that page. Coe vs Armour Fertilizer Works, 237 U. S. 413, at page 426. I believe there was another case in my notes that I have. Has your Honor got the Dodge case that I gave you this morning on the point of jurisdiction?

THE COURT: Yes.

MR. IRWIN: What was that citation again?

MR. SCHLEIMER: 272 U. S. 530.

Now, then, the Underwriter's case, that was cited in the Dodge case.

THE COURT: That is referred to in the Dodge opinion?

MR. SCHLEIMER: It is referred to in the lower court, but it finally landed in the United States Supreme Court, and it was known in the United States Supreme Court as Maul vs U. S., 274 U. S. 501. I think that is all, your Honor.

THE COURT: Then is the matter to stand submitted?

MR. PARKER: If your Honor please, may I make a statement? At a session or two ago in this case Mr. Irwin requested the court to enter an order that I appear as amicus curiae, and so an order was entered. Counsel was present at that time and made no objection, but after that time he wrote a letter to your Honor and objected to my appearance. Since that objection, I have not appeared in the way of argument, otherwise than to assist Mr. Irwin. I want to ask your Honor at this time that because there was such a Minute Order entered, that an order be entered now relieving me of such appearance, so that no service of papers may have to be made on me after this.

THE COURT: Very well, that order will be vacated.

MR. IRWIN: In response to your Honor's inquiry, the matter is submitted as far as the Government is concerned.

THE COURT: Very well, we will adjourn at this time until 10:00 o'clock tomorrow morning.

(Whereupon, at 5:15 o'clock P. M., an adjournment was taken until August 8, 1934, at 10:00 o'clock A. M.)

[Title of Court and Cause.]

Petition and Order Extending Term.

COMES now the respondent and Toichi Tomikawa, the claimant herein, by Max Schleimer, their proctor, and in connection with the application for appeal, moves the court to keep the term open until and including December 1, 1934, for the purpose of retaining jurisdiction to settle the narrative statement of the evidence on appeal herein, and to sign the engrossed copy thereof and the record on appeal for the reason that unless an order be made to that effect, said appellants will sustain irreparable injury.

Max Schleimer
Proctor for Appellants

And now, to wit, on this 4th day of September, 1934, on the foregoing presentation and consideration of the petition, it is,

ORDERED, that the petition is granted as prayed for, and the present term is hereby extended to and including December 1, 1934, for the purpose of passing upon the narrative statement of the evidence on appeal, to sign the engrossed narrative statement of the evidence on appeal and the record on appeal when presented.

Hollzer
United States District Judge

Filed Sep 4, 1934

[Title of Court and Cause.]

Stipulation and Order Extending Time to Serve and File a Narrative Statement of the Evidence.

It is agreed between the parties hereto, through their respective counsel, that the appellants' time within which to serve and file a proposed narrative statement of the evidence is extended to and including October 4, 1934, and that an order to that effect may be made and entered without notice to either party.

Dated, September 17, 1934.

Max Schleimer
Proctor for Appellants.

Peirson M. Hall
United States Attorney.

Ernest R. Utley
Assistant United States Attorney.

Upon the foregoing stipulation, it is ordered that appellant's time within which to serve and file a proposed narrative statement of the evidence is extended to and including October 4, 1934.

Dated, September 20, 1934.

Hollzer
United States District Judge.

Filed Sep 20, 1934

[Title of Court and Cause.]

Stipulation and Order Extending Time to Serve and File a Narrative Statement of the Evidence.

It is agreed between the parties hereto, through their respective counsel, that the appellants' time within which to serve and file a proposed narrative statement of the evidence is extended to and including November 1, 1934, and that an order to that effect may be made and entered without notice to either party.

Dated, October 3, 1934.

Max Schleimer
Max Schleimer
Proctor for Appellants.

Peirson M. Hall
Pierson M. Hall
United States Attorney.

Ernest R Utley
Ernest R Utley
Assistant United States Attorney.

Upon the foregoing stipulation, it is ordered that appellant's time within which to serve and file a proposed narrative statement of the evidence is extended to and including November 1, 1934.

Dated, October 3, 1934.

Hollzer
United States District Judge.

Filed Oct 3, 1934

[Title of Court and Cause.]

Stipulation and Order Extending Time to Settle and File the Narrative Statement of the Evidence.

It is agreed between the parties hereto, through their respective counsel, that the appellant's time within which to settle and file the narrative statement of the evidence is extended to and including December 1, 1934, and that an order to that effect may be made and entered without notice to either party.

Dated, November 1, 1934.

Max Schleimer
Max Schleimer
Proctor for Appellants.

Peirson M Hall
Pierson M. Hall
United States Attorney.

Ernest R. Utley
Ernest R. Utley
Assistant United States Attorney.

Upon the foregoing stipulation, it is ordered that appellant's time within which to settle and file the narrative statement of the evidence is extended to and including December 1, 1934.

Dated, November 1, 1934.

Hollzer
Judge United States District Court.

Filed Nov. 1, 1934.

Wherefore, to the end that the proceedings and exceptions aforesaid may be and remain of record, the respondent and claimant, within the time required by law and the orders of this court, here now present the within and foregoing narrative statement of the evidence on claimant's motion to quash said libel, exhibits, orders and all proceedings had thereon and on the trial of said libel, exhibits, orders and all proceedings had thereon on their appeal from the decree in said action, and for any and all purposes for which such narrative statement of the evidence may properly be used.

Dated, October 18, 1934.

Max Schleimer
Proctor for Respondent and Claimant.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

UNITED STATES OF AMERICA, Libelant, against AMERICAN OIL SCREW "PATRICIA", No. 970-A, her cargo, engines, tackle, apparel, furniture, etc., Respondent.	No. 5567-H.

STIPULATION THAT NARRATIVE STATEMENT OF THE EVIDENCE MAY BE SETTLED AND ALLOWED.

It is hereby stipulated and agreed, by and between the proctors for the libelant and respondent and claimant in

the above numbered and entitled action, that the within and foregoing narrative statement of the evidence, on claimant's motion to quash said libel, exhibits, orders and all proceedings had thereon, and on the trial of said libel, exhibits, orders and all proceedings had thereon is true and correct, and that the same may be settled and allowed as the engrossed said narrative statement of the evidence forthwith and without notice to either party, on this, the appeal taken by respondent and claimant herein from the decree entered herein and each and every part thereof, and for any and all purposes for which same may properly be used.

Dated, Nov 9, 1934.

Peirson M. Hall
U. S. Attorney

By Ernest R. Utley
Asst
Proctor for Appellee,

Max Schleimer
Proctor for Appellant

ORDER SETTLING NARRATIVE STATEMENT OF THE EVIDENCE.

Upon the foregoing stipulation of the proctors for the libelant and respondent and claimant and good and sufficient cause appearing therefor, it is hereby ordered that the within and foregoing narrative statement of the evidence, on claimant's motion to quash said libel, exhibits, orders and proceedings had thereon, and on the trial of said libel, exhibits, orders and all proceedings had thereon, is true and correct, and that the same is, hereby settled and allowed and ordered filed as the engrossed said narrative statement of the evidence on this, the appeal taken by respondent and claimant herein from the decree entered herein and for any and all purposes for which same may properly be used.

Dated, Nov. 12, 1934.

Hollzer

Judge United States District Court.

[Endorsed]: Original No. 5567-H In the District Court of the United States, In and for the Southern District of California, Central Division. United States of America, Libelant, vs. American Oil Screw "Patricia," etc., Respondent. NARRATIVE STATEMENT OF THE EVIDENCE, etc. Received copy of the within Narrative Statement of the Evidence, etc., this 18th day of October, 1934. Peirson M. Hall, D. H., Attorney for Libelant. Lodged Oct. 18 1934, R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk. Filed Nov 12 1934 R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk. Max Schleimer, Attorney for Claimant 355 So. Broadway, Los Angeles, Calif. TU 7714

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard before the Hon. Harry A. Hollzer, United States District Judge for the Southern District of California, on the libel and amended libel herein of the United States of America, and on the claim and answer of Toichi Tomikawa, and evidence both oral and documentary having been introduced herein, the Court being fully advised in the premises and the cause having been submitted to the court for decision, and the Court having made a minute order dated April 6, 1934, ordering that the second and third counts of the amended libel be sustained, and that decree be entered in conformity therewith in favor of Libelant, the Court now makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

The respondent herein, the Oil Screw Vessel known as "Patricia", loaded with a cargo of assorted intoxicating liquor on board was seized by an officer of the United States Coast Guard, Section Base No. 17, Port of Los Angeles, California, on March 23, 1932, while said Respondent vesel was on the high seas, to-wit: the Pacific Ocean, and traveling toward the coast of the United States and within four leagues of said coast, to-wit: at a point between ten and eleven miles off the nearest coast of the southerly portion of the State of California, and which said nearest coast to the said point of seizure is within the jurisdiction

of the United States District Court for the Southern District of California.

II.

That after the said seizure the said Officers of the United States Coast Guard towed the said Oil Screw Vessel "Patricia" to the United States Coast Guard Base in the harbor of San Pedro, Los Angeles, California.

III.

That after the said Vessel arrived at said United States Coast Guard Base, in custody under said seizure, the United States Collector of Customs of the Port of Los Angeles, State of California, District No. 27, adopted the aforesaid seizure made by the said officers of the United States Coast Guard under Customs Seizure 11,800 as to the Oil Screw Vessel "Patricia", her engines, tackle, apparel, furniture, etc., and as Customs Seizure No. 11,799 covering the cargo on said vessel at the time of seizure consisting of 1749 sacks of assorted spirituous liquor and 112 empty oil drums.

IV.

That thereafter the said Collector of Customs of the Port of Los Angeles, State of California, District No. 27, caused the said vessel and cargo to be appraised and that the said vessel, her engines, tackle, apparel, furniture, etc., was appraised as having a value of $8,000.00, and that the said cargo was appraised under Section 607 of the Tariff Act of 1930 for the purpose of forfeiture proceedings as having a value not exceeding $1,000.00, and the said cargo was appraised for the purpose of a basis of penalty against

the Master of the vessel under Sections 584 and 595 of the Tariff Act of 1930 as having a penalty value of $17,490.00.

V.

That thereafter, to-wit: on April 1, 1932, the said United States Collector of Customs under the provisions of Section 610 of the Tariff Act of 1930, requested the United States Attorney for the Southern District of California, to institute libel proceedings against the Oil Screw Vessel "Patricia", her engines, tackle, apparel, furniture, etc., for a violation of the Customs and Navigation Laws of the United States.

VI.

That thereafter the said Collector of Customs proceeded with disposition of the said cargo under the provisions of Section 607 of the Tariff Act of 1930 by advertising for a period of three successive weeks notice of seizure and intention to dispose of said cargo as required by law, and said Section 607 of the Tariff Act of 1930; that the first publication of said notice and advertisement was duly made in the Los Angeles Times, a newspaper of general circulation in Los Angeles, California, on August 17, 1932, and the second and third publications of said notice were likewise made in the said Los Angeles Times on August 24, 1932 and August 31, 1932; that no claim was filed with the said United States Collector of Customs under the provisions of Section 608 of the Tariff Act of 1930 within the time required by said Section; that thereafter upon compliance with the said provisions of Section 608 of the Tariff Act of 1930, the said United States Collector of Customs disposed of said cargo of intoxicating liquor by destruction of same except that five cases of said intoxicating liquors

were retained to be used in evidence by the United States Attorney for the Southern District of California as required.

VII.

That thereafter, and on or about April 28, 1932, the United States Attorney for the Southern District of California filed the libel of the United States in this matter and caused this action to be instituted and caused the issuance of process of this court against the said Oil Screw Vessel "Patricia", her cargo, engines, tackle, apparel, furniture, etc.

VIII.

That under said Process so issued by this court, the United States Marshal for the Southern District of California, arrested and attached the said Oil Screw Vessel "Patricia", her engines, tackle, apparel, furniture, etc., and filed in this court his return of such arrest and attachment, and that the said United States Marshal did not arrest or attach the cargo of the said Oil Screw Vessel "Patricia".

IX.

That thereafter, to-wit: on or about May 23, 1932, Toichi Tomikawa filed herein a verified petition to quash seizure of the said Oil Screw Vessel "Patricia" and all process and proceedings based thereon and an objection to the jurisdiction of the court herein, and a special appearance entered herein by Max Schleimer as Attorney for said Claimant Toichi Tomikawa, in which said verified petition Toichi Tomikawa asserted that he was the claimant of the vessel "Patricia", and that neither in said special appearance nor in said Petition to quash seizure, nor otherwise

did said claimant, Toichi Tomikawa file in this action a claim for the cargo on board said Oil Screw Vessel "Patricia" at the time of its seizure on March 23, 1932.

X.

That thereafter, on or about October 17, 1932, claimant, Toichi Tomikawa, filed an Answer to the libel of information herein; that neither in said Answer nor otherwise did the said claimant, Toichi Tomikawa file in this action any claim for the said cargo of the said Oil Screw Vessel "Patricia."

XI.

That the Respondent Vessel "Patricia" was pulled in to the United States and within the jurisdiction of the United States District Court for the Southern District of California.

XII.

That at all the times mentioned in the amended libel and at the time of the seizure aforesaid, the respondent vessel was owned by the claimant, one Toichi Tomikawa, a subject of the Empire of Japan.

XIII.

That at the time of, and several years next preceding the seizure of the respondent vessel said claimant, Toichi Tomikawa, maintained a home and was domiciled in the United States of America in the Southern District of California.

XIV.

That on or about March 18, 1932, on application of said claimant, Toichi Tomikawa, there was awarded to the respondent vessel "Patricia" by the United States Collector

of Customs for District No. 27, the number 970-A; that at the time of said seizure the said vessel "Patricia" bore said number 970-A.

XV.

That at all times herein mentioned the said respondent vessel "Patricia" carried on its stern as the designation of the home port of said vessel the letters "L. A.", printed thereon in large letters and commonly understood to indicate "Los Angeles" as the home port of said vessel.

XVI.

That respondent vessel "Patricia" was never registered, nor licensed, nor enrolled, nor documented by the Japanese Government; that at the time of the boarding, search, and seizure referred to herein, of respondent vessel "Patricia" by the United States Coast Guard, the said respondent vessel "Patricia" was not flying the Japanese flag and was not entitled to fly the Japanese flag, and did not have a nationality certificate, nor a provisional nationality certificate of the Japanese Government.

XVII.

That on or about March 23, 1932, and within five days from the date upon which the claimant, Toichi Tomikawa secured from the United States Collector of Customs for District No. 27 at the Port of Los Angeles, California, the number 970-A, for said Oil Screw Vessel "Patricia", an officer of the United States Coast Guard, boarded the respondent vessel "Patricia" while said vessel was on the high seas, namely, the Pacific Ocean, and traveling toward the coast of the United States and within four leagues of said coast, to-wit: at a point between ten and eleven miles

off the nearest coast of the southerly portion of the State of California.

XVIII.

That at the time said officer of the United States Coast Guard boarded said respondent vessel, and prior to the search and seizure thereof, said officer requested the person in charge of said respondent vessel for the manifest and for the registration papers of said vessel, and was informed that neither any manifest nor registration papers were on board; that at said time the crew of said vessel consisted of three persons who gave their names to the Officer of the United States Coast Guard as Nick Bartich, T. Tomikawa and G. Horoto; that one of the said three members of said crew who gave his name as T. Tomikawa, is the same person as the claimant herein, Toichi Tomikawa, and that at the time of said boarding of said vessel the said Toichi Tomikawa was in charge of and was the Master of said respondent vessel "Patricia."

XIX.

That upon the failure of the Master of said vessel, or any of the persons thereon, to produce the Manifest thereof upon demand, said Officer of the United States Coast Guard seized and searched said respondent vessel and found on board thereof the cargo of assorted intoxicating liquors, the domestic value of which for use as a basis in fixing the penalty outlined in Section 584 of the Tariff Act of the United States of 1930, was later determined as aforesaid by the United States Collector of Customs to amount to the sum of Seventeen Thousand Four Hundred Ninety Dollars ($17,490.00).

XX.

That at the time of said seizure of respondent vessel "Patricia" the Master thereof, in violation of Section 584 of the Tariff Act of 1930 (19 USCA 1584) failed and refused to produce the manifest of said respondent vessel "Patricia" in response to the demand of said officer of the Coast Guard, and by reason thereof the Master of said respondent vessel became liable to a penalty of Five Hundred Dollars ($500.00), and to a further penalty equal to the value of the cargo of the respondent vessel "Patricia" under the provisions of Section 584 of the Tariff Act of 1930, and the said respondent vessel likewise became liable to the payment of said penalty under the provisions of Section 594 of the Tariff Act of 1930 (19 USCA 1594).

XXI.

That at the time of the boarding, search and seizure of said respondent vessel "Patricia", on March 23, 1932, the said vessel "Patricia" was engaged in trade in violation of Section 4189 of the Revised Statutes (46 USCA 60) and at the said time of the boarding, search and seizure of said respondent vessel "Patricia" the number 970-A, theretofore granted to it, by the United States Collector of Customs for District No. 27 of the Port of Los Angeles, California, was knowingly and fraudulently used for said respondent vessel, when it was not entitled to the benefit thereof and by reason of the said respondent vessel "Patricia" being at said time engaged in trade and knowingly and fraudulently using the said number 970-A when it was not entitled to the benefit thereof, the said respondent vessel "Patricia", her engines, tackle, apparel and furniture became liable to forfeiture.

CONCLUSIONS OF LAW

As Conclusions of Law from the foregoing Findings of Fact the court concludes as follows:

I.

That the cargo of the vessel "Patricia" at the time of its seizure herein did not come within the jurisdiction of this court, in this libel proceeding and was rightfully and lawfully disposed of by the United States Collector of Customs for District No. 27 of the Port of Los Angeles, California, under the provisions of Section 607 of the Tariff Act of 1930.

II.

That the boarding, search and seizure of the vessel "Patricia" by the United States Coast Guard on or about March 23, 1932, was lawful and proper under the laws and statutes of the United States of America, and occurred within four leagues of the coast of the United States of America and that this court has jurisdiction of these proceedings.

III.

That Toichi Tomikawa, the Master of the said respondent vessel "Patricia", is liable to the United States for a penalty of Five Hundred Dollars ($500.00) because of failure to produce to the officer of the United States Coast Guard boarding said vessel, on March 23, 1932, a Manifest of the said vessel under the provisions of Section 584 of the Tariff Act of 1930 (19 USCA 1584) and that the said penalty of Five Hundred Dollars ($500.00) against said Master may be recovered from and out of and is chargeable against the said vessel "Patricia".

IV.

That by reason of his failure to produce a Manifest as aforesaid, Toichi Tomikawa, the Master of said vessel, has become liable to the United States for a penalty equal to the value of the merchandise seized as the cargo of said respondent vessel "Patricia", to the amount of Seventeen Thousand Four Hundred Ninety Dollars ($17,-490.00), and that the said penalty may be recovered from the said respondent vessel "Patricia", and that the said vessel is liable therefor under the provisions of Section 584 of the Tariff Act of 1930 (19 USCA 1584).

V.

The Court further concludes that Count 1 of the Amended Libel is not sustained and the said Count 1 should be dismissed.

VI.

That on or about March 23, 1932, the number, to-wit: 970-A granted to the said respondent vessel "Patricia" by the United States Collector of Customs for District No. 27 of the Port of Los Angeles, California, five days prior thereto, was knowingly and fraudulently used for the said vessel "Patricia" when she was not entitled to the benefit thereof, and that on said date and at the time and place of seizure the said vessel Patricia was engaged in trade in violation of Section 4189 of the Revised Statutes (46 USCA 60), for which reasons the said vessel "Patricia", her engines, tackle, apparel, furniture, etc., were subject to forfeiture to the United States of America.

The Court, therefore, orders and directs that a decree be entered herein accordingly for the forfeiture of the said respondent vessel "Patricia", her engine, tackle, apparel, furniture, etc., and disposition thereof in accordance with law, and that the libelant herein, United States of America, recover its costs of suit herein.

Done in open Court this 9th day of Aug., 1934.

Hollzer
United States District Judge.

I respectfully decline to approve the above for the reason that it is not in proper form, and for the further reasons stated in my memorandum which is herewith submitted under separate cover.

Respectfully,
Max Schleimer
Att'y for Rspt & Claimant

[Endorsed]: No. 5567-H. In the District Court of the United States for the Southern District of California Central Division. The United States of America, libelant vs. The American Oil Screw "Patricia" No. 970-A, her engines, tackle, apparel, furniture, etc., respondent, and Toichi Tomikawa, claimant. FINDINGS OF FACT AND CONCLUSIONS OF LAW. Received copy this 16th day of May, 1934 of the within proposed findings. Max Schleimer attorney for claimant. Filed Aug 9-1934 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

THE UNITED STATES OF AMERICA, Libelant, vs.	:	
AMERICAN OIL SCREW "PATRICIA", No. 970-A, her engines, tackle, apparel, furniture, etc., Respondent. and	:	No. 5567-H. FINAL DECREE
TOICHI TOMIKAWA, Claimant.	:	

This cause having come on to be heard at this term and evidence oral and documentary having been introduced herein, and having been argued by counsel for the respective parties and having been submitted to the court for decision, the court upon consideration thereof having made and entered therein its Findings of Fact and Conclusions of Law,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the libelant herein, United States of America, have and recover under the second count of the amended libel herein, from Toichi Tomikawa, claimant herein, the Master of the respondent vessel "Patricia" a penalty of Five Hundred Dollars ($500.00) for violation of Section 584 of the Tariff Act of 1930, and that the said respondent vessel "Patricia" is answerable and liable for the said penalty against said Master;

2. That the libelant herein, United States of America, have and recover under the second count of the amended libel herein, from Toichi Tomikawa, claimant herein, the Master of the respondent vessel "Patricia", a penalty in the sum of Seventeen Thousand Four Hundred Ninety Dollars ($17,490.00), the value of the merchandise seized by the United States Coast Guard as the cargo of the respondent vessel "Patricia" for violation of Section 584 of the Tariff Act of 1930, and that the vessel "Patricia" is answerable and liable for the said penalty against said Master;

3. That the respondent vessel "Patricia", her engines, tackle, apparel, furniture, etc., is condemned and forfeited to the United States of America, libelant herein, under the third count of the amended libel herein, for violation of Section 4189 of the Revised Statutes.

4. It is ordered that said vessel "Patricia" be sold by the United States Marshal for the benefit of the United States of America in accordance with law.

That the libelant herein have and recover from the claimant herein, Toichi Tomikawa, its costs expended herein taxed in the sum of $710.66.

Dated: Aug. 9, 1934.

Hollzer
United States District Judge.

I respectfully decline to approve the above for the reasons stated in my memorandum which is herewith submitted under separate cover.

Respectfully,

Max Schleimer,
Max Schleimer,
Att'y for Rspt & Claimant.

Decree entered and recorded Aug. 9-1934

R. S. ZIMMERMAN,
Clerk,

by M. R. Winchell
Deputy Clerk.

[Endorsed]: No. 5567-H. In the District Court of the United States for the Southern District of California, Central Division. The United States of America, libelant, vs. American Oil Screw "Patricia" No. 970-A, her engines, tackle, apparel, furniture, etc., respondent and Toichi Tomikawa, Claimant. FINAL DECREE. Received copy of the within Proposed Decree this 16th day of May, 1934 Max Schleimer, attorney for claimant Filed Aug. 9-1934 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday, the 10th day of August, in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable HARRY A. HOLLZER, District Judge.

UNITED STATES OF AMERICA, Libelant	:	
vs.	:	No. 5567-H.
AMERICAN OIL SCREW "PATRICIA", etc., Respondent	:	

Upon application of the plaintiff, and good cause appearing therefor,

IT IS HEREBY ORDERED that the Final Decree entered herein on the 9th day of August, 1934, be amended to strike out from line 13, page 2, the following words, "Twenty-six Thousand two hundred fifty Dollars ($26,-250.00)."

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the United States of America, libelant, Pierson M. Hall, United States Attorney, proctor for said libelant, R. S. Zimmerman, Clerk of said court.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that, the said respondent and Toichi Tomikawa, the claimant herein, pursuant to the order made by the Honorable Harry A. Hollzer, one of the judges of said court, dated September 4, 1934, hereby appeals to the United States Circuit Court of Appeals, in and for the Ninth Circuit, from the decree entered herein, on August 9, 1934, as amended by the order made and entered on August 10, 1934, and the said respondent and claimant hereby appeal from the whole and each and every part of the said decree.

Dated, September 4, 1934.

Max Schleimer
Max Schleimer
Proctor for Appellants
355 So. Broadway Los Angeles, Calif. TU 7714

[Endorsed]: Original. No. 5567-H. United States District Court, Southern District of California, Central Division. United States of America, libelant, vs. American Oil Screw "Patricia" etc. respondents. NOTICE OF APPEAL. Filed Sep. 4 - 1934. R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk. Max Schleimer, Proctor for appellants 355 So. Broadway, Los Angeles, Calif. TU 7714

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Harry A. Hollzer, one of the judges of said court.

COMES now said respondent and Toichi Tomikawa, the claimant herein, by Max Schleimer, their proctor, and feeling aggrieved by the final decree made by this court herein, and entered on August 9, 1934, as amended by an order entered herein on August 10, 1934, hereby pray that an appeal may be allowed to them from the said decree to the United States Circuit Court of Appeals, in and for the Ninth Circuit, and, in connection with this petition, petitioners herewith present their assignment of errors, and they also pray that the amount of security for costs may be fixed in the sum of $250.00 in accordance with Section 1, Rule 2, of the rules in admiralty, the United States Circuit Court of Appeals for the Ninth Circuit, by the order allowing the appeal, and that the time within which to serve and file a proposed narrative statement of the evidence be extended to and including September 20, 1934.

Dated, September 4, 1934.

Max Schleimer

Max Schleimer

Proctor for Respondent and Claimant.

[Endorsed]: Original. No. 5567-H. United States District Court, Southern District of California, Central Division United States of America, libelant vs. American Oil Screw "Patricia" etc. respondents. PETITION FOR APPEAL. Filed Sep. 4 - 1934 R. S. Zimmerman, Clerk By L Wayne Thomas, Deputy Clerk Max Schleimer, Proctor for appellants 355 So. Broadway, Los Angeles, Calif. TU 7714

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

UNITED STATES OF AMERICA, Libelant, against AMERICAN OIL SCREW "PATRICIA", No. 970-A, her cargo, engines, tackle, apparel, furniture, etc., Respondent.	No. 5567-H. Assignment of Errors.

COMES now the American Oil Screw "Patricia", etc., and Toichi Tomikawa, the respondents in the above entitled proceeding, the appellants herein, by Max Schleimer, their proctor, and in connection with their petition for appeal say that, in the record, proceedings and in the final decree herein, manifest error has intervened to the prejudice of the appellants herein, to wit:

1. That the court erred in refusing to make finding of fact "I", namely, that K. Uyeji and O. Uyemotto, *citizen* of the Empire of Japan, in the year of 1924, built the vessel "Patricia" at the Terminal Island, California.

2. That the court erred in refusing to make finding of fact "2", namely, that on July 12, 1924, the Collector of Customs of the Port of Los Angeles, California, District No. 27, entered in his book known as "American built and alien owned vessels", that said vessel was built and owned

by said K. Uyeji and O. Uyemoto, citizens of the Empire of Japan.

3. That the court erred in refusing to make finding of fact "3", namely, that on July 11, 1930, the said K. Uyeji and O. Uyemoto sold said vessel to George Kioo Agawa, a citizen of the Empire of Japan, and that the then Collector of Customs of the Port of Los Angeles, California, District No. 27, entered said sale in his said book.

4. That the court erred in refusing to make finding of fact "4", namely, that on March 13, 1932, said George Kioo Agawa sold said vessel to Toichi Tomikawa, a citizen of the Empire of Japan, and the then Collector of Customs of the Port of Los Angeles, California, District No. 27, entered said sale in his said book, and thereupon allotted and gave the said vessel the number of "970-A".

5. That the court erred in refusing to make finding of fact "5", namely, that the measurements of said vessel are 82 feet length, 18.5 feet breath, 8-75 feet draft loaded, and that at the time of the seizure hereinafter stated she was equipped with a Fairbanks-Morse Engine of 1924, of 100 horse power.

6. That the court erred in refusing to make finding of fact "6", namely, that the maximum speed which said vessel could sail or traverse under her own power, at the time of the seizure hereinafter stated, was 7.9 nautical miles per hour.

7. That the court erred in refusing to make finding of fact "7", namely, that about between July 12, 1924, and March 18, 1932, the said owners of said vessel paid "light money" to the respective Collectors of Customs of

the Port of Los Angeles, California, District No. 27, on the basis of 43 tons net, 50 cents per ton, $1.00 for 5 certificates of such payment annually during said period. That said payments were demanded by the said Collectors of Customs and paid by said owners respectively pursuant to the provisions of Section 4225 of the Revised Statutes of the United States, now known as 46 USCA 128.

8. That the court erred in refusing to make finding of fact "8", namely, that on March 23, 1932, the revenue cutter known as CG-259 of the United States Coast Guard, section base No. 17, in charge of Frederick J. Dwight, Chief Boatswain's Mate, was on the high seas of the Pacific Ocean, in search of a reported capsized vessel and sighted said vessel "Patricia", and proceeded towards her. That when he overtook her, he came alongside of her and the said Chief Boatswain's Mate noticed that she was loaded below her water mark, and he ordered said vessel to stop. When she did so, he then placed a seaman first class on board her, and later he went on board her, without a search warrant or other process issued by a court of competent jurisdiction. That after they were on board her he opened her hatchways and found that she was loaded with sacks containing spirituous liquors. Thereupon he arrested Toichi Tomikawa, her master, the claimant herein, and her crew, and seized the said vessel "Patricia", her cargo, engines, tackle, apparrel, furniture, and everything that was on board her at that time.

9. That the court erred in refusing to make finding "10", namely, that the place of said seizure of said vessel "Patricia" was between 19 and 20 miles southeast true from San Mateo Rock of San Juan Point, California.

10. That the court erred in refusing to make finding of fact "11", namely, that the place of said seizure was ascertained by dead reckoning running from the position where the said revenue cutter started from the Point of San Clemente Island, California, in search of the reported capsized vessel.

11. That the court erred in refusing to make finding of fact "12", namely, that at the place where, and at the time when, the said seizure was made of the said vessel "Patricia", there was no vessel or vessels near her, or anywhere in sight of her.

12. That the court erred in refusing to make finding "13', namely, that said vessel "Patricia" could not sail under her own power within one hour from said place of seizure to San Mateo Rock of San Juan Point, California, which was the nearest point of land of the United States.

13. That the court erred in refusing to make finding of fact "15", namely, that after said vessel "Patricia" was at section base No. 17, San Pedro, California, in the Harbor of Los Angeles, California, in the custody of the United States Coast Guard under said seizure, the then Collector of Customs of the Port of Los Angeles, California, District No. 27, adopted the said seizure made.

14. That the court erred in refusing to make finding of fact "16", namely, that at the time the then Collector of Customs of the Port of Los Angeles, California, District No. 27, adopted the said seizure, he took into his possession and custody the said vessel "Patricia", her cargo, engines, tackle, apparel, furniture, and everything that was on board her. The said cargo consisted of 112 empty oil drums and 1749 sacks each containing assorted spirituous liquors.

15. That the court erred in refusing to make finding of fact "17", namely, that after the Collector of Customs of the Port of Los Angeles, California, District No. 27, had taken possession and custody of the said vessel "Patricia", and her cargo, engines, tackle, apparel, furniture, and everything that was on board her, caused its value to be appraised. The said vessel "Patricia" was appraised at the sum of $8,000, and the cargo of assorted spirituous liquors at the sum of $17,490.00.

16. That the court erred in refusing to make finding of fact "18", namely, that on or about April 28, 1932, the then United States Attorney for the Southern District of California, Central Division, upon the request and instruction of the then Collector of Customs of the Port of Los Angeles, California, District No. 27, instituted this libel proceeding to condemn and forfeit said vessel "Patricia" and her cargo, engines, tackle, apparel, furniture, and everything that was on board her, and caused the issuance of process out of this court to arrest and attach same, and that the same was arrested and attached by the United States Marshal in and for the Southern District of California, Central Division.

17. That the court erred in refusing to make finding of fact "19", namely, that at the time and place where the said vessel "Patricia" was seized on the high seas, there was a fog, and that the said vessel was drifting in order to enable its master to ascertain his whereabouts and to get his bearings.

18. That the court erred in refusing to make finding of fact "20", namely, that at the time and place where the said vessel "Patricia", was seized on the high seas, the said Frederick J. Dwight, the Chief Boatswain's

Mate, of the revenue cutter CG-259 of the United States Coast Guard, base No. 17, or any member of its crew, did not have a search warrant or any other process authorizing him, or them, to go on board of said vessel "Patricia" to search her, or for any other purpose.

19. That the court erred in refusing to make finding of fact "21", namely, that the said Toichi Tomikawa, the master of said vessel "Patricia", the claimant herein, was, at all times hereinbefore and hereinafter stated, and is, an alien and a citizen of the Empire of Japan, and is incapable of becoming a citizen of the United States under the provisions of Section 2169 of the Revised Statutes of the United States, now known as 8 USCA 359.

20. That the court erred in refusing to make finding of fact "22", namely, that at all times hereinbefore and hereinafter stated, the domicile of the said Toichi Tomikawa, claimant herein, was, and is, in the city of Nishinomiya in the Providence of Hyogo, Japan, where he domiciled with his wife and son, and temporarily resided or sojourned, while in the United States, at Terminal Island, California.

21. That the court erred in refusing to make finding of fact "23", namely, that the Treaty between the United States and Japan, proclaimed April 5, 1911, 37 U. S. Stat. 1504-1509, Article IV, among other things provides that the citizens or subjects of Japan shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the United States; that Article XIII, Part One, among other things, provides that the citizens or subjects of Japan shall enjoy the

most-favored nation treatment in the territories of the United States.

22. That the court erred in refusing to make finding of fact "24", namely, that the Convention between the United States and Japan, proclaimed January 16, 1930, 46 U. S. Stat. 2446-2448, Article I, among other things, provides that it was the firm intention of the High Contracting Parties to uphold the principle that 3 marine miles extending from the coast line outwards and measured from the low-water mark constitutes the proper limits of the territorial waters of the United States. Article II, among other things, empowers the Government of the United States to board private vessels under the Japanese flag outside the said limits of territorial waters for the purpose of ascertaining whether the vessel, or those on board, are endeavoring to import alcoholic beverage into the United States, and its territories or possessions, in violation of its laws, providing such vessel, *are* vessels, under its own power can traverse in one hour from the place of such search to the nearest point of landing of the United States.

23. That the court erred in refusing to make finding of fact "25", namely, that the said seizure of the said vessel "Patricia" took place on the high seas of the Pacific Ocean outside of 3 marine miles extending from the coast line outwards and measured from the low-water mark, the limits of territorial waters as agreed upon by said Convention.

24. That the court erred in refusing to make finding of fact "26", namely, that the then Collector of Customs of the Port of Los Angeles, California, District No. 27,

had no power, authority or jurisdiction to allot and give the vessel "Patricia" the number "970-A", and that the allot*t*ment and giving of said number did not attach to her the same dignity as would have been the case if her owner had been a citizen of the United States.

25. That the court erred in refusing to make finding of fact "27", namely, that on the return of the monition, the respondent and Toichi Tomikawa, the appellants herein, appeared specially in this libel proceeding and made an application to set aside said seizure and to quash this proceeding upon the ground, among other things, that the said seizure was illegal and unlawful and thereby the court did not acquire jurisdiction in the premises, for the reason that the ownership of said vessel determined her nationality, and her owner being a citizen of the Empire of Japan, the nationality of said vessel was deemed as that of Japan, and that under the said Treaty and Convention the boarding her and seizure was without authority or law.

26. That the court erred in refusing to make finding of fact "28', namely, that the issues raised on said application were tried in open court, witnesses were called by the respective parties and were duly examined and cross examined by their respective proctors, and that such proceedings were had thereon that resulted in the making, filing, and entry of a minute order overruling said objection, denying said application to set aside said seizure and to quash the libel proceeding herein.

27. That the court erred in refusing to make finding of fact "29", namely, that on May 4, 1932, the Grand

Jury of this Court filed an indictment against the said Toichi Tomikawa, the master of said vessel "Patricia", the claimant herein, and his crew, which indictment, known as No. 10,898-H-CR. That thereafter they appeared specially in said criminal action and objected to the jurisdiction of the court and moved the court to quash and set aside said indictment on the ground, among others, that their arrest at the place aforesaid was illegal, unlawful, and in violation of the said Convention for the reasons, among others, stated in paragraph "25" hereof; that such proceedings were thereafter had that resulted in the making and entry of a minute order denying said application on May 20, 1932; that thereafter the said Toichi Tomikawa, the claimant and one of the appellants herein, one of the defendants in said criminal action, duly moved the court, upon the testimony and proceedings had in this libel proceeding, for a rehearing of said application to quash and set aside the said indictment upon the ground, among others, that said arrest at the said place was illegal, unlawful, and in violation of the said Convention; that such proceedings were duly had upon said application that resulted in the making and entry of a minute order on April 24, 1933, and a judgement was duly entered thereon on June 2, 1933, quashing and dismissing the indictment in the said criminal action; that the time to appeal therefrom has long ago expired and that no appeal was taken from said order and judgement by the libelant herein, the plaintiff in said criminal action, and that the said judgement is in all respects final and conclusive.

28. That the court erred in refusing to make finding of fact "30", namely, that the appellants herein includ-

ing the said Toichi Tomikawa, the master of said vessel "Patricia", the claimant herein, who was one of the defendants in said criminal action, duly requested the court in this proceeding to take judicial notice of the minute order and judgement made and entered in the said criminal action, and offered to introduce same in evidence of this proceeding and urged among other things, that the said minute order and judgement made and entered in said criminal action was a bar in this proceeding against the libelant herein on the issue that the said seizure of said vessel "Patricia", at the place aforesaid, was illegal, unlawful, and in violation of said Convention.

29. That the court erred in refusing to make finding of fact "31", namely, that thereafter such proceedings were duly had in this proceeding that resulted in the making and entry of findings of fact and conclusions of law and a decree thereon on or about June 28, 1933, adjudging, among other things, that the libel herein be dismissed upon the merits, that the said Toichi Tomikawa, the claimant herein, was entitled to the return of said vessel "Patricia", her cargo, engines, tackle, apparel, furniture, and everything which was on board her on March 23, 1932, at the time she was seized as hereinbefore stated.

30. That the court erred in refusing to make finding of fact "32", namely, that thereafter the court, upon the application of the libelant, made and entered herein a minute order on August 21, 1933, as modified by the minute order made and entered herein on September 15, 1933, vacating the said findings of fact and conclusions of law and decree, and continuing this cause for further

hearing on the merits in order that the court might hear further argument with particular reference to the question whether the vessel "Patricia", under the libel herein is entitled to the provisions of the said Convention, in order to stop tolling the time to appeal before the court could determine that question.

31. That the court erred in refusing to make finding of fact "33", namely, that on January 29, 1934, while the court had under consideration the question referred to in paragraph "30" hereof, said Toichi Tomikawa, claimant herein, duly moved the court to dismiss the libel upon the ground, among others, that on December 5, 1933, that 21st Amendment to the Constitution of the United States was duly proclaimed as ratified, which repealed the 18th Amendment to the Constitution of the United States, and that by reason thereof, the libel herein abated, and that the jurisdiction of the court was arrested except to enter an order dismissing the libel with direction to return to said claimant the said vessel, cargo, engines, tackle, apparel, furniture, and everything that was on board her which was seized, as hereinbefore stated.

32. That the court erred in refusing to make conclusion of law "A", namely, that when the vessel "Patricia", was built her nationality was that of Japan.

33. That the court erred in refusing to make conclusion of law "B", namely, that by purchasing the vessel, the said Toichi Tomikawa, the claimant herein, became her sole and exclusive owner.

34. That the court erred in refusing to make conclusion of law "C", namely, that Toichi Tomikawa, the

claimant herein, was, and is, a citizen of the Empire of Japan.

35. That the court erred in refusing to make conclusion of law "D", namely, that when Toichi Tomikawa, the claimant herein, became the owner of the said vessel "Patricia", her nationality was that of her said owner.

36. That the court erred in refusing to make conclusion of law "E", namely, that the actions and conduct of the said Collectors of Customs in entering said vessel in their books as an American built and alien Japanese owned vessel precludes the libelant herein from disputing that fact.

37. That the court erred in refusing to make conclusion of law "F", namely, that the actions and conduct of the said Collectors of Customs in demanding and receiving annually "light money" of the owners of said vessel during said period precludes the libelant herein from disputing the fact that the nationality of the vessel "Patricia" is Japanese.

38. That the court erred in refusing to make conclusion of law "G", namely, that the Statute which authorized the giving of a number to a vessel contemplated and was intended to apply to vessels owned exclusively by citizens of the United States, and not to American built and alien Japanese owned vessels.

39. That the court erred in refusing to make conclusion of law "H", namely, that the Collectors of Customs had no right or authority to give said vessel "Patricia" the number "970-A".

40. That the court erred in refusing to make conclusion of law "I", namely, that the giving of said num-

ber to said vessel by the Collectors of Customs did not attach any dignity to her, nor convert her into a vessel of the United States.

41. That the court erred in refusing to make conclusion of law "J", namely, that the number "970-A" and the letters "L.A." painted or appearing on the stern of said vessel at the time she was seized as aforesaid did not attach any dignity to her, nor signify that she was a vessel of the United States as contemplated by law.

42. That the court erred in refusing to make conclusion of law "K", namely, that the domicile of Toichi Tomikawa, the appellant herein was, and is, in the city of Nishinomiya in the Province of Hyogo, Japan, and was not changed by his residence within the United States.

43. That the court erred in refusing to make conclusion of law "L", namely, that the residence within the United States of Toichi Tomikawa, the appellant herein, is deemed temporary and not permanent.

44. That the court erred in refusing to make conclusion of law "M", namely, that the fact that the said vessel appeared to be loaded below her water mark did not empower or authorize the said Chief Boatswain's Mate of said revenue cutter to send one of his crew on board her and himself board her, without a search warrant or other process issued by a court of competent jurisdiction.

45. That the court erred in refusing to make conclusion of law "N", namely, that the actions of said Chief Boatswain's Mate and a member of his crew going on board of said vessel and opening her hatchways and searching for spirituous liquors without a search warrant,

was a violation of the 4th and 5th Amendments to the Constitution of the United States.

46. That the court erred in refusing to make conclusion of law "O", namely, that the actions of said Chief Boatswain's Mate and a member of his crew in searching the said vessel "Patricia" without a search warrant, and in seizing her, was null and void, illegal, and unlawful.

47. That the court erred in refusing to make conclusion of law "P", namely, that the said search and seizure of said vessel "Patricia" on the high seas, outside of 3 marine miles from the coast of the United States, constituted a violation of Article I of the said Convention proclaimed January 16, 1930, 46 U. S. Stat. pages 2446-2448.

48. That the court erred in refusing to make conclusion of law "Q", namely, that the said search and seizure of said vessel "Patricia" on the high seas, constituted a violation of Article II of the said Convention proclaimed January 16, 1930, 46 U. S. Stat. pages 2446-2448, for the reason that the said vessel was incapable of sailing under her own power within one hour from the said place of seizure to the nearest point of land of the United States.

49. That the court erred in refusing to make conclusion of law "R", namely, that the flying of a flag is merely notice to which nationality the vessel belongs but is not evidence of that fact.

50. That the court erred in refusing to make conclusion of law "S", namely, that the failure of said vessel "Patricia" to fly the Japanese flag at the time of her said

seizure, did not authorize the boarding her for said purpose nor justify her said seizure.

51. That the court erred in refusing to make conclusion of law "T", namely, that the nationality of the owner of said vessel "Patricia" and not the flying of a flag on her mast determines her nationality.

52. That the court erred in refusing to make conclusion of law "U", namely, that all proceedings based on said search and seizure are null and void, contrary to law, and are of no legal force and effect.

53. That the court erred in refusing to make conclusion of law "V", namely, that the adoption of the said seizure by the said Collector of Customs is null and void and of no legal force and effect.

54. That the court erred in refusing to make conclusion of law "W", namely, that all proceedings based upon the adoption of said seizure by the Collector of Customs are null and void and of no legal force and effect.

55. That the court erred in refusing to make conclusion of law "X", namely, that the said order and judgement in the criminal action precludes the libelant herein from disputing the nationality of the said vessel as being a Japanese vessel.

56. That the court erred in refusing to make conclusion of law "Y", namely, that the said Toichi Tomikawa, the master of said vessel "Patricia", did not violate any statute or law of the United States which subjected him to the payment of a penalty.

57. That the court erred in refusing to make conclusion of law "Z", namely, that the said Toichi Tomikawa,

the master of said vessel "Patricia", at the time of said seizure, did not violate any statute or law of the United States which subjected him to the payment of a penalty.

58. That the court erred in refusing to make conclusion of law "AA", namely, that said vessel "Particia" did not violate any statute or law of the United States which subjected her to the payment of a penalty, or condemnation, or forfeiture.

59. That the court erred in refusing to make conclusion of law "BB", namely, that said vessel "Patricia", at the time of said seizure, did not violate any statute or law of the United States which subjected her to the payment of a penalty or condemnation or forfeiture.

60. That the court erred in refusing to make conclusion of law "CC" namely, that upon the adoption of the 21st Amendment to the Constitution of the United States, which repealed the 18th Amendment thereof, this libel proceeding abated and thereby arrested the jurisdiction of the court to the premises except to order this action to be dismissed with direction to return to Toichi Tomikawa, the appellant herein, the said vessel "Patricia", her cargo, engines, tackle, apparel, furniture, and everything that was on board her at the time of said seizure.

61. That the court erred in refusing to make conclusion of law, namely, in directing the action that the libel in this proceeding be dismissed upon the merits, and that Toichi Tomikawa, the appellant herein was entitled to the return of said vessel "Patricia", her cargo, engines, tackle, apparel, furniture and everything that was on board her at the time of said seizure, and that the decree be entered in favor of said claimant, Toichi Tomikawa, the appellant

herein, against the said libelant, the United States of America, with costs to be taxed by the clerk of the court and inserted in the decree.

62. That the court erred in making finding of fact "I" so much thereof which states that the vessel "Patricia" was "traversing toward the coast of the United States".

63. That the court erred in making finding of fact "III", namely, that the Collector of Customs made two separate adoptions of the seizure namely, one of the vessel, her engines, tackle, apparel, furniture, etc., and the other of her cargo.

64. That the court erred in making finding of fact "IV", namely, that the Collector of Customs caused the cargo to be appraised under Section 607 of the Tariff Act of 1930 for the purpose of forfeiture proceedings as having a value not exceeding $1000.00, and that said cargo was appraised for the purpose of a basis of penalty against the master of the vessel under Section 548 and 595 of the Tariff Act of 1930 as having a penalty value of $17,490.00.

65. That the court erred in making finding of fact "V", namely, that on April 1, 1932, the Collector of Customs under the provisions of Section 610 of the Tariff Act of 1930, requested that the United States Attorney for the Southern District of California, to institute a libel proceeding against the vessel "Patricia", her engines, tackle, apparel, furniture, etc., for violation of the customs and navigation laws of the United States, and in this respect appellants allege that said requests also included the cargo.

66. That the court erred in making finding of fact "VI", namely, that the Collector of Customs proceeded with the disposition of the cargo under Section 607 of the Tariff Act of 1930 by advertising and in this regard appellant alleges that the original libel of information included the cargo and therefore the Collector of Customs had no legal right or authority to proceed with the disposition of the cargo under said Section 607.

67. That the court erred in making finding of fact "IX", namely Toichi Tomikawa, the appellant herein, did not file in this proceeding a claim for the cargo on board of the said vessel "Patricia" at the time of its seizure on March 23, 1932.

68. That the court erred in making finding of fact "X", namely that on or about August 17, 1932, Toichi Tomikawa, the appellant herein, did not with his answer nor otherwise file in this proceeding a claim for the cargo on board the vessel "Patricia".

69. That the court erred in making finding of fact "XIII", namely, that Toichi Tomikawa, the appellant herein, was domiciled in the United States of America in the Southern District of California.

70. That the court erred in making finding of fact "XV", namely, that the letters "L. A." printed on the stern of the vessel was commonly understood to indicate "Los Angeles" as the home port of said vessel.

71. That the court erred in making finding of fact "XVI", namely, that the vessel "Patricia" was never registered nor licensed, nor enrolled, nor documented by the Japanese government; that at the time of the boarding,

search, and seizure referred to herein, the said vessel was not flying the Japanese flag, and was not entitled to fly the Japanese flag, and did not have a nationality certificate, nor a provisional nationality certificate of the Japanese government, and in this regard appellants alleges that there is no evidence to support said finding and that regardless of that the nationality of the vessel "Patricia" is deemed by law to be the nationality of Japan.

72. That the court erred in making finding of fact "XVII", namely, that the vessel "Patricia" was travelling toward the coast of the United States, and in this regard appellant alleges that said finding is unsupported by any evidence, and that the undisputed evidence is to the effect that the said vessel was travelling for the purpose to enable her master to ascertain his whereabouts and his bearings because of the fact that the weather was foggy at the time, and that he did not intend to proceed to the United States of America.

73. That the court erred in making finding of fact "XVIII", namely that the officer of the United States Coast Guard, prior to the search and seizure, requested the person in charge of the vessel "Patricia" for the manifest and for the registration papers of said vessel and in this regard appellants allege that the boarding of the vessel was unlawful because the officer had no search warrant in his possession, and that the vessel "Patricia" is deemed to be a Japanese vessel and therefore had no right to search and seize her at the point or place where he boarded said vessel.

74. That the court erred in making finding of fact "XIX".

75. That the court erred in making finding of fact "XX".

76. That the court erred in making finding of fact "XXI".

77. That the court erred in making conclusion of law "I", namely, that the cargo on board of the vessel "Patricia" at the time of the seizure did not come within the jurisdiction of the court in this libel proceeding, and was rightfully and lawfully disposed of by the Collector of Customs under the provisions of Section 607 of the Tariff Act of 1930.

78. That the court erred in making conclusion of law "II", namely, that the boarding, search and seizure of the vessel "Patricia" by the United States Coast Guard on or about March 23, 1932, was lawful and proper under the laws and statutes of the United States of America, and that the court had jurisdiction of this proceeding.

79. That the court erred in making conclusion of law "III", namely, that Toichi Tomikawa, the master of the vessel "Patricia", is liable to the United States for a penalty of $500.00 because of failure to produce to the officer of the United States Coast Guard boarding said vessel on March 23, 1932, a manifest of said vessel and that the said penalty of $500.00 against said master may be recovered from and out of and is chargeable against said vessel "Patricia".

80. That the court erred in making conclusion of law "IV", namely, that by reason of the failure to produce a manifest, Toichi Tomikawa, the master of said vessel, became liable to the United States for a penalty according to the value of the merchandise seized as the cargo of the

vessel "Patricia" to the amount of $17,490.00, and that said penalty may be recovered from the said vessel and that said vessel is liable therefor under the provisions of Section 584 of the Tariff Act of 1930.

81. That the court erred in making conclusion of law "VI", namely, that the number of the said vessel was knowingly and fraudulently used for said vessel and that the said vessel was engaged in trade in violation of Section 4189 of the Revised Statutes, and because of that the vessel, her engines, tackle, apparel, furniture, etc., are subject to forfeiture to the United States of America, and in this regard the appellant alleges that there is no evidence upon which this finding is predicated, and that the undisputed evidence is to the effect that when the Collector of Customs awarded the said vessel the number he was duly informed that the said vessel was an American built and alien owned vessel, and that there is no evidence to support the finding that the vessel was engaged in trade.

82. That the court erred in ordering and directing that a decree be entered for the forfeiture of the vessel "Patricia", her engines, tackle, apparel, furniture, etc., and disposition thereof in accordance with law, and that the libelant, the United States of America, recover its costs of suit.

83. That the court erred in making the decree directing that the libelant, the United States of America, have and recover under the second count of the amended libel herein, from Toichi Tomikawa, the appellant herein, the master of the vessel "Patricia", a penalty of $500.00 for violation of Section 584 of the Tariff Act of 1930, and

that the said vessel "Patricia" is answerable to and liable for the said penalty against said master.

84. That the court erred in making the decree directing that the libelant, The United States of America, have and recover under the second count of the amended libel herein from Toichi Tomikawa, appellant herein, the master of said vessel "Patricia", a penalty in the sum of $17,490.00, the value of the merchandise seized by the United States Coast Guard as the cargo of the said vessel "Patricia" for violation of Section 584 of the Tariff Act of 1930, and that said vessel "Patricia" is answerable and liable for the said penalty against said master.

85. That the court erred in making the decree directing that the vessel "Patricia", her engines, tackle, apparel, furniture, etc., is condemned and forfeited to the United States of America, libelant herein, under the third count of the amended libel herein for violation of Section 4189 of the Revised Statutes.

86. That the court erred in making the decree directing that the said vessel "Patricia" be sold by the United States Marshal for the benefit of the United States of America in accordance with law.

87. That the court erred in making the decree directing that the libelant herein, the United States of America, have and recover from the said Toichi Tomikawa its costs expended herein taxed in the sum of $710.66.

88. That the court erred in ruling at the trial, that the respondent and claimant, the appellants herein, had the affirmative to go first forward with their evidence in support of their application to quash the libel herein, and

that the burden of proof was upon them to establish that the seizure was unlawful.

89. That the court erred in denying the motion of the respondent and claimant, the appellants herein, to quash the libel herein upon the ground that the court was without jurisdiction to entertain the libel of information for the reason that the original libel of information did not state the place on the high seas where the seizure was made by the Coast Guard; that the undisputed evidence was to the effect that Toichi Tomikawa was the sole and exclusive owner of the vessel "Patricia"; that he was a subject of Japan; that the nationality of the said vessel was deemed that of her owner; that said vessel was deemed Japanese vessel; that the undisputed evidence was to the effect that the said vessel could not sail or traverse under her own power, within one hour from the place of seizure to the nearest point of land of the United States, and that it was undisputed that there was no other vessel or boat near her or in sight of her at the place where she was seized.

90. That the court erred in denying the motion made by the respondent and claimant, the appellants herein, at the close of the case for judgment in their favor upon the following grounds: First, that the undisputed evidence was to the effect that at the time the vessel "Patricia" was seized, Toichi Tomikawa, the claimant herein, one of the appellants herein, was a subject of Japan; that he was the exclusive owner of said vessel; that by reason thereof, the nationality of said vessel is Japanese. Therefore, the officer of the Coast Guard had no jurisdiction or authority to go on board her and seize her at

the point or place where she was seized on high seas. Second, that the Collector of Customs had no jurisdiction, power or authority to number the vessel "Patricia" for the reason that he knew the applicant was a citizen of the Empire of Japan; that the statute relating to numbering of vessels applied exclusively to a vessel owned by a citizen of the United States; that the numbering of the vessel "Patricia" is null and void and of no legal effect. Third, that the nationality of the vessel "Patricia" must be judged by the nationality of her owner; that her owner is a citizen of the Empire of Japan; and that said vessel is deemed a Japanese vessel. Fourth, that there was no evidence that the said vessel was in contact with any other vessel or boat, on the high seas, at the point or place where she was seized; that there was no evidence that said vessel could traverse or sail under her own power, within one hour, from point or place of seizure to the nearest point of land. Fifth, that the undisputed evidence was to the effect that the maximum speed of said vessel is 7.6 nautical miles per hour, or 7.9 nautical miles per hour, and that between March 15, 1929, and March 15, 1932, said vessel, while on the high seas, could not make a speed of more than 7 knots per hour; that by reason thereof, said vessel could not have traversed or sailed in one hour from the point or place of seizure on the high seas to the nearest point of land as provided for in the Convention between the United States and the Empire of Japan, proclaimed January 16, 1930, U. S. Stat. pages 2446-2448. Sixth, that if the court should hold that said Convention did not apply to said vessel that would be tantamount to a decision of failing to give effect to its provisions; that

Article I, of said Convention expressly provided that in such event the territorial limits of the United States was to be regarded as 3 marine miles off shore. Therefore, upon libelant's own showing, the seizure was made outside of that limit and was unlawful. Seventh, that the undisputed and uncontradicted evidence was to the effect that said vessel was at the point or place of seizure solely for the purpose to ascertain her position and to get her bearings and intended to return on the high seas to the place where she had been, which was very far out on the high seas, and that when she arrived at the said point for said purpose she was seized, and because of that the Coast Guard authorities had no jurisdiction to seize her. Eighth, that the said vessel was seized on the high seas in violation of the Statutes of the United States. Ninth, that the said vessel was seized on the high seas in violation of the Convention between the United States and Japan, 46 Stat. 2446-2448.

91. That the court erred in denying the motion made by the respondent and claimant, the appellants herein to vacate and set aside the ex parte minute orders, dated respectively, August 21, 1933, and September 15, 1933, which vacated and set aside the judgment entered herein, and continued this cause for further argument on the merits, with particular reference to the question whether the vessel "Patricia" under libel is entitled to the provisions of the Treaty with Japan bearing date March 31, 1928, (46 Stat. 2446), upon the ground that the court, prior to the entry of the said judgment had passed upon that question several times, and that the ground assigned by the court was insufficient in law for making the said orders.

92. That the court erred in refusing to take judicial notice of the judgment entered in the case of the United States of America, plaintiff, vs. Toichi Tomikawa, et al., defendants, No. 10,898-H, which involved the same charges as in this cause and which judgment was in legal effect an acquittal and constituted res adjudicata in this cause.

93. That the court erred in denying the motion made by the respondent and claimant, the appellants herein, to vacate and set aside the ex parte minute order dated August 2, 1934, setting this cause down for further hearing with respect to the matters therein stated for the reason they were not an issue in this cause and that the evidence was immaterial.

94. That the court erred in overruling the objection made by the respondent and claimant, the appellants herein, to the introduction in evidence of the report made by Frederick J. Dwight of the seizure, marked Government's Exhibit 1 of August 7, 1934.

95. That the court erred in overruling the objection made by the respondent and claimant, the appellants herein, to the question: "Q. With particular relation to the seizure of the boat "Patricia", was there any other seizure other than No. 11,800 made by your office?" upon the ground that the question was irrelevant and immaterial, and that the pleadings admitted that the Collector of Customs adopted the seizure.

96. That the court erred in overruling the objection made by the respondent and claimant, the appellants herein, to the introduction in evidence of the report made by Frederick J. Dwight of the seizure, marked Government's Exhibit 2 of August 7, 1934, upon the ground that the

pleadings admitted that the Collector of Customs adopted the seizure, and that it was an attempt to inject a new issue, and was not in the pleadings and was not before the court.

97. That the court erred in overruling the objection made by the respondent and claimant, the appellants herein, to the introduction in evidence of the letter dated April 1, 1932, written by Howard W. Seager, Collector of Customs, by Charles W. Salter, Assistant Collector, upon the ground that the pleadings admitted that the Collector of Customs adopted the seizure and the said letter was therefore incompetent, irrelevant, and immaterial, and an attempt to inject an issue not before the court.

98. That the court erred in overruling the objection made by the respondent and claimant, the appellants herein, to the introduction in evidence of the letter dated July 8, 1933, sent by Charles W. Salter, Assistant Collector, and addressed to United States Attorney, Attention Assistant Attorney Irwin, upon the ground that it was self-serving declaration, incompetent, irrelevant, and immaterial, and not within the issues in this cause.

99. That the court erred in overruling the objection made by the respondent and claimant, the appellants herein, to the introduction in evidence of the Marshal's return in the case No. 4024-C upon the ground that it was incompetent, irrelevant and immaterial, and not binding on the appellants herein, and that the same did not prove any of the issues involved in the pleadings herein.

100. That the court erred in refusing to receive in evidence the judgment roll in the case of the United States

of America vs. Frank Oreb, et al., No. 10,898, offered by the respondent and claimant, the appellants herein, which said judgment roll showed that the court in that action determined that the vessel "Patricia" was a Japanese vessel, and that the seizure made herein was unlawful, and therefore, that judgment was res adjudicata on these issues in this cause.

WHEREFORE, appellants pray that the decree herein, of the District Court of the United States, in and for the Southern District of California, Central Division, be reversed with costs, with instructions that the amended libel of information be dismissed with costs, and that the libelant be directed to return to the claimant the vessel "Patricia", her cargo, engines, tackle, apparel, furniture, etc., and that the cause be remanded with directions to proceed in accordance with law.

Max Schleimer
Max Schleimer
Proctor for Appellants

355 So. Broadway
Los Angeles, Calif.
TU 7714

[Endorsed]: Original No. 5567-H United States District Court, Southern District of California, Central Division. United States of America, libelant vs. American Oil Screw "Patricia", etc., respondents. ASSIGNMENT OF ERRORS. Filed Sep. 4-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk. Max Schleimer, Proctor for appellants 355 So. Broadway, Los Angeles, Calif., Tu 7714

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

UNITED STATES OF AMERICA, Libelant, against AMERICAN OIL SCREW "PATRICIA", No. 970-A, her cargo, engines, tackle, apparel, furniture, etc., Respondent.	No. 5567-H. Order Allowing Appeal, Fixing Amount of Bond for Costs and Extending Time to File Narrative Statement of the Evidence.

And now, to wit, on this 4th day of September, 1934, on the presentation and consideration of the petition for an appeal, it is,

ORDERED, that the petition for an appeal from the decree entered herein, is granted and allowed as prayed for, and said respondent and Toichi Tomikawa, the claimant herein, within 10 days give a bond for costs of the appeal, with sufficient sureties, in the penal sum of $250.00, conditioned that the appellants shall prosecute their appeal to effect and pay the costs, if the appeal is not sustained, in accordance with Section 1, Rule 2, of

the rules in admiralty, United States Circuit Court of Appeals, for the Ninth Circuit, and it is further

ORDERED, that the time of said respondent and claimant within which to serve and file a proposed narrative statement of the evidence herein, is hereby extended to and including September 20, 1934.

Dated, September 4, 1934.

Hollzer
U. S. District Judge.

[Endorsed]: Original No. 5567-H. United States District Court, Southern District of California, Central Division. United States of America, libelant, vs. American Oil Screw "Patricia", etc., respondents. ORDER ALLOWING APPEAL, FIXING AMOUNT OF BOND, etc. Filed Sep. 4, 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk. Max Schleimer, Proctor for appellants 355 So. Broadway, Los Angeles, Calif. Tu 7714

WESTERN SURETY COMPANY
HOME OFFICE—SIOUX FALLS,
SOUTH DAKOTA

COST BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that we, Toichi Tomikawa, as principal, and WESTERN SURETY COMPANY, as surety, are held and firmly bound unto United States of America in the full sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said United States of America, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 4th day of September, 1934.

WHEREAS, lately, in the District Court of the United States, in and for the Southern District of California, Central Division, in a suit pending in said Court between the United States of America, libelant, against American Oil Screw "Patricia". No. 970.-A, her cargo, engines, tackle, apparel, furniture, etc. Respondent, and the said respondent and Toichi Tomikawa, have petitioned for and been allowed an appeal to the Circuit Court of *Appeal* for the *n*inth Circuit, and a citation has been issued directed

to the said United States of America, libelant, citing it to appear in the Circuit Court of Appeals for the *n*inth Circuit, within thirty days from and after the date of such citation.

NOW, the condition of the above obligation is such that if the said appellants shall prosecute said appeal to effect, and answer all costs, if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Toichi Tomkawa
TOICHI TOMIKAWA

[Seal] BY P. F. Kirby

For WESTERN SURETY COMPANY
Peirson M. Hall,
By J. J. Irwin, Asst. U. S. Attorney

Approved as to form and sufficiency

Dated: September 4, 1934.

Hollzer
U. S. District Judge

STATE OF SOUTH DAKOTA,)
) ss.
County of Minnehaha,)

On this 4th day of September A. D. 1934, before me, a Notary Public in and for said County, personally appeared P. F. Kirby personally known to me, who being by me duly sworn, did say that he is the Vice-President of the WESTERN SURETY COMPANY of Sioux Falls, South Dakota, a corporation duly organized and existing under the laws of the State of South Dakota, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, that the said instrument was signed, sealed and executed in behalf of said corporation by authority of its Board of Directors, and further acknowledged that the said instrument and the execution thereof to be the voluntary act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal at Sioux Falls, S. D., the day and year last above written.

I. Henry Harris
Notary Public.

[Endorsed]: No. 5567-H. U. S. District Court United States of America, vs. American Oil Screw "Patricia". etc. COST BOND ON APPEAL. Filed Sep. 4-1934 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk Max Schleimer, Proctor for Appellants.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

UNITED STATES OF AMERICA, Libelant, against AMERICAN OIL SCREW "PATRICIA", No. 970-A, her cargo, engines, tackle, apparel, furniture, etc., Respondent.	No. 5567-H. Amended Praecipe for Record on Appeal.

To the clerk of the above named court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed and taken in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. Libel of information, filed on April 28, 1932.
2. Order for process to issue, filed on April 28, 1932.
3. Monition.
4. Answer to the libel of information, filed on October 17, 1932.

5. Stipulation for Costs, filed on November 17, 1932.

6. Amended libel of information, filed on March 29, 1933.

7. Findings of fact and conclusions of law, filed on August 9, 1934.

8. Decree filed and entered on August 9, 1934.

9. Minute Order amending decree, made on August 10, 1934.

10. Assignment of Errors.

11. Petition for appeal.

12. Order allowing appeal, fixing cost bond and extending time to file narrative statement of the evidence.

13. Citation on Appeal.

14. Affidavit of service of Citation on Appeal.

15. Notice of appeal.

16. Cost bond on appeal.

17. Narrative statement of the evidence.

18. This praecipe and service thereof.

19. Clerk's certificate of certification.

Said transcript to be prepared as required by law and rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on or before December 1, 1934.

Dated, October 4, 1934.

Max Schleimer
Max Schleimer
Proctor for Appellants.

It is stipulated by and between the proctors for the respective parties herein that the foregoing amended praecipe for record on appeal shall constitute the apostles on said appeal, and that the appeal be heard thereon. Service of the above praecipe is accepted and acknowledged this 18th day of October, 1934.

Dated, October 18th, 1934.

Max Schleimer
Max Schleimer
Proctor for Appellants.

Peirson M. Hall
Pierson M. Hall
United States Attorney.

Ernest R. Utley
Ernest R. Utley
Assistant United States Attorney.
Proctors for Appellee.

[Endorsed]: Original No. 5567-H United States District Court Southern District of California Central Division United States of America Libelant vs. American Oil Screw "Patricia", etc. Respondent. AMENDED PRAECIPE FOR RECORD ON APPEAL Received copy of the within Amended Praecipe this 18th day of October, 1934 Peirson M. Hall D. H. attorney for Libelant Filed Oct 27 1934 R. S. Zimmerman, Clerk by Edmund L. Smith, Deputy Clerk Max Schleimer Proctor for Appellants 355 So. Broadway Los Angeles, Calif. TU 7714.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 363 pages, numbered from 1 to 363 inclusive, to be the Apostles on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; libel of information; order for process to issue; monition with return; answer to libel of information; stipulation for costs; amended libel of information; statement of evidence; findings of fact and conclusions of law; final decree; order of August 10, 1934, amending decree; notice of appeal; petition for appeal; assignment of errors; order allowing appeal and fixing bond; cost bond on appeal, and amended praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing apostles on appeal is $
and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing apostles on appeal amount to

.....and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of November, in the year of Our Lord One Thousand Nine Hundred and Thirty-four, and of our Independence the One Hundred and Fifty-ninth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 7681.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Toichi Tomikawa,
Claimant and Appellant,

American Oil Screw "Patricia," No. 970-A, her cargo, engines, tackle, apparel, furniture, etc.,
Respondent,

against

United States of America,
Libelant and Appellee.

BRIEF FOR TOICHI TOMIKAWA, CLAIMANT AND APPELLANT.

MAX SCHLEIMER,
Grant Bldg., 355 So. Broadway, Los Angeles, California.
Proctor for Claimant and Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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No. 7681.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Toichi Tomikawa,
Claimant and Appellant,

American Oil Screw "Patricia," No. 970-A, her cargo, engines, tackle, apparel, furniture, etc.,
Respondent,

against

United States of America,
Libelant and Appellee.

BRIEF FOR TOICHI TOMIKAWA, CLAIMANT AND APPELLANT.

STATEMENT OF CASE.

Nature of Appeal.

The appellant is a subject of Japan and the owner of the vessel "Patricia". On March 23, 1932, she was seized by the Coast Guard more than one hour sailing distance from the coast. On the return of the monition, he appeared specially, objected to the jurisdiction of the court,

and moved to quash the seizure on the ground the seizure was in violation of the Convention and Treaty between the United States and Japan. The evidence on that issue was heard in open court, and the motion was denied. Thereafter, the appellant filed an answer. Subsequently, the case was submitted on the merits upon the same evidence. The trial court made an order reciting that appellant is a subject of Japan, the owner of the vessel, she was entered as an *alien* vessel, paid *light money* and that the seizure was in violation of the Convention between the United States and Japan, proclaimed January 16, 1930, and thereafter made a decree dismissing the libel and directing the return of the vessel and cargo. Thereafter he set aside the findings and decree on libelant's motion. Subsequently, he made a decree of forefiture. The appeal is from the last named decree. The principal questions are twofold, (1) Was appellant entitled to the benefits of said Convention? (2) Was he entitled to the same treatment as a subject of Great Britain under the most favored nation clause of the Treaty between the United States and Japan of February 21, 1911? These questions are encompassed by other important questions relating to orders, findings made and refusal to find, too numerous to detail them here. They are stated under separate points.

Nationality of Appellant.

Appellant was born in Japan; his parents are Japanese; he is not a citizen of the United States; he is married and domiciles in Japan where he lives with his wife and child; he entered this country under a passport and temporarily resides at Terminal Island, California [R. pp. 51, 263, 264].

Nationality of Vessel.

In 1924, K. Uyeji and O. Uyemoto, Japanese, built a vessel at Terminal Island, California, and christened her "Patricia" [R. p. 134]. On July 16, 1930, they sold her to George Kioo Agawa, a Japanese [R. p. 134]. On March 13, 1930, Agawa sold her to appellant [R. p. 135]. The Collector of Customs, Marine Department, entered her in his records as an American built and Japanese owned vessel [R. pp. 134, 135], and entered said sales in his records [R. p. 134].

The Seizure.

On March 23, 1932, Frederick J. Dwight, Chief Boatswain's Mate, in charge of Revenue Cutter, No. 259, seized the vessel with her cargo on the high seas, and arrested appellant and his crew [R. p. 76], and then towed the vessel and cargo to the Coast Guard Base No. 27, at San Pedro, California [R. p. 83]. Dwight testified that the place of seizure was 10½ miles from the coast [R p. 75]. Appellant testified it was over 19 miles from the coast [R. p. 44]. The U. S. Attorney admitted that it was more than on hour sailing distance from the coast [R. p. 150].

The Libel.

On April 28, 1932, the then U. S. Attorney filed a libel of information against the *cargo* and vessel for alleged violations, (1) engaging in trade, and (2) refusing to produce a manifest for the cargo [R. pp. 5-9]. On the same day the court made an order for process to issue against the cargo and vessel [R. pp. 10-11]. On the same day, a monition was issued against the *cargo* and vessel [R. pp. 12-13].

Motion to Quash the Seizure.

Appellant appeared specially on the return of the monition [R. p. 31], filed a special notice of appearance [R. pp. 38-39], motion to quash the seizure [R. pp. 32-33] and a petition in support thereof [R. pp. 33-37]. The evidence on that issue was heard in open court [R. pp. 41-93]. There was a dispute as to the *place* where the seizure was made. Appellant and his witnesses testified that it was *19* miles from the coast and libelant's witnesses testified that it was between *10* and *11* miles from the coast. This dispute is unimportant because the U. S. Attorney, subsequently, *admitted* in open court that the seizure was made *"more than one hour's sailing distance from shore"* [R. p. 150]. The trial court directed the submission of briefs, and reserved decision on said motion [R. p. 94].

Additional Evidence on Motion.

Appellant moved to reopen the hearing, before said motion to quash was decided, and to permit him to file two affidavits, or, in lieu thereof, to examine the affiants in open court [R. p. 95]. The libelant consented to the filing of said affidavits [R. pp. 95-96]. The trial court reopened the hearing for that purpose, and directed the filing of said affidavits [R. p. 97]. The affiant Lambie averred as to the dimensions of the vessel [R. p. 97], and alleged that her maximum speed is 7.9 nautical miles per hour [R. p. 98]. The affiant Young averred as to the dimensions of the vessel [R. p. 98], and alleged that her maximum speed, loaded, is 7.6 knots per hour [R. p. 99].

Disposition of Motion to Quash.

The trial court, thereafter, overruled the objection to the jurisdiction of the court and denied the motion to quash the seizure with an exception to appellant [R. p. 99].

Answer to Libel.

On October 17, 1932, appellant filed an answer, in which he denied the material allegations of the libel of information, and set up *three* affirmative defenses, namely, (1) that the Collector of Customs had no authority or jurisdiction to number the vessel, (2) that the vessel was seized on the high seas more than one hour sailing distance from the coast, and was unlawful, and (3) that the master of the vessel did not proceed or intend to proceed to the United States, but was taking bearings to ascertain his whereabouts when the vessel was seized [R. pp. 15-22].

Ruling of Ultimate Question Involved.

On October 31, 1932, the case appeared on the calendar for setting. Appellant's proctor discussed the outstanding features on the motion to quash the seizure. The trial court answered that, from an examination of the record, *"We are convinced that the defendant owner of the boat did not know where his boat was"*, referring to the place of the seizure. He coincided with the proctors that the case be presented upon the same evidence taken on the motion to quash the seizure, and added, "We believe that ultimately the termination of this case involves a question of *law*, rather than of *fact*" [R. p. 100].

Motion to Dismiss Libel.

On December 5, 1932, the date set for trial, appellant moved to dismiss the libel of information on the ground that it did not allege the *place* where the seizure was made, and it did not show that the seizure was made within the limits of the jurisdiction of the court [R. pp. 101-102]. In a colloquy between the court and appellant's proctor, the court stated that he passed upon that objection [R. pp. 102-103], and appellant insisted that that *precise* question was not raised on the motion to quash the seizure, and was not passed upon by the trial court [R. pp. 103-104]. The trial court then asked the libelant's proctor whether he desired to amend the libel of information by reciting it, and he declined. Thereupon, the trial court denied the motion with an exception to appellant [R. p. 104].

Stipulation Submitting the Case.

The proctors for the respective parties stipulated in open court that the testimony taken on behalf of libelant on the motion to quash the seizure be deemed as the testimony taken upon the trial of the merits of the case, and that the testimony taken on behalf of appellant on the motion to quash the seizure be deemed as the testimony taken upon the trial of the merits of the case, including said affidavits [R. pp. 105-106].

Motion to Amend Libel.

Thereafter, the trial court granted libelant permission to amend its libel of information [R. p. 106], with the condition that all shall be deemed denied [R. p. 107].

Amended Libel.

On March 29, 1933, libelant filed an amended libel of information [R. p. 29], consisting of three counts, namely, (1) that the vessel was seized on the high seas at a point between 10 and 10½ miles southwest true from San Mateo Rocks off the coast of California, and at that time she was engaged in trade ; (2) alleged refusal to produce manifest, and (3) alleged knowingly and fraudulently using the number which the vessel was not entitled to [R. pp. 25-29].

Motion for Judgment.

Appellant moved for judgment as though it was made at the *close* of the whole case [R. p. 105] on the ground, among others, that the claimant was a subject of Japan and the sole owner of the vessel; that the vessel is deemed a foreign vessel; that the Collector of Customs had no power or jurisdiction to number the vessel; that the numbering of the vessel was of no legal force or effect; that there was no evidence that the vessel was in contact with any other vessel; that the vessel could not traverse within one hour distance from the place of seizure to the coast; that the vessel was incapable of traversing the distance in one hour and that appellant was entitled to the benefits of said Convention [R. pp. 108-112]. The trial court directed filing of briefs and reserved decision on that motion, stating that thereafter he would set the case down for oral argument [R. pp. 112-113].

Ruling Limiting Case to One Question.

On February 27, 1933, the case appeared on the calendar for the purpose of informing proctors whether the trial court desired to hear further argument and on what particular question and appellant's proctor called that to the attention of the trial court [R. p. 114]. The trial court then ruled that, "there are two main questions, one of which we are inclined to think has been disposed of by a recent decision of the United States Supreme Court (referring to *Cook v. United States,* 288 U. S. 102) to the effect that if this boat be regarded as a foreign vessel, then the fact that the place of seizure was more than one hour's sailing from the territorial waters of the United States would make the seizure illegal". The other question, he said, "was the numbering of the boat in effect a legal registration of it so as to make it a domestic vessel?" [R. p. 114]. He then ruled that *"the proof in this case indicates that it was seized at a point more than one hour's sailing distance"* [R. p. 115]. He suggested that to counsel and added "that leaves for further discussion the question,—did the fact that the Department gave this boat a number constitute it a domestic vessel?" [R. p. 115].

Ruling of Seriousness of Seizure.

On March 13, 1933, libelant moved to reopen the trial, for the purpose of introducing additional evidence [R. p. 116]. Appellant objected on the ground that the motion was not based upon papers [R. p. 117]. The trial court sustained that objection, and added: "The seizure of a vessel on the high seas is a serious matter, and the contention of the respondent that it involves a violation of a treaty with a friendly power only adds to the responsi-

bility resting upon the court to give consideration to only the facts and not when its attention is called to a situation that there is possibly some facts that have to bear upon the merits of the case not yet in the record" and continued the case to enable libelant to serve a written application [R. p. 119].

Renewal Motion to Reopen Trial.

On March 24, 1933, libelant renewed his motion to reopen the trial [R. p. 120] for the purpose to examine the Japanese Vice Consul, in order to prove that the vessel was not registered with the Japanese Government [R. p. 122]. Appellant stipulated that the vessel was not registered, licensed, or documented by the Japanese Government [R. p. 123]. The trial court did not accept that stipulation [R. pp. 124-125].

Libelant's Additional Evidence.

The trial was reopened and libelant called as its witness Kakichi Ozawa, the Vice Consul of Japan [R. p. 126]. He said that he did not study all the laws of Japan but only the Civil and Criminal Codes and Political Science [R. p. 126]. He said that he brought with him the laws concerning Japanese ships, published by the Bureau of Communication of Japan [R. p. 127]. He said that Article V provided that an owner must register the vessel at the Government's office of the port which has the jurisdiction, and the name cannot be changed [R. p. 130]. He also testified that he brought with him an indicia of all Japanese vessels, published by the Department of Communication of Japan [R. p. 130]. The trial court then

desired to know the history of the vessel [R. pp. 130-133]. The examination of that witness was suspended for that purpose [R. p. 133].

Vessel's Number and Payment of Light Money.

Appellant called Carl O. Metcalf as his witness and he testified that he was the Chief Clerk of the Collector of Customs, Marine Department since 1916 [R. p. 134]. He produced three cards showing that between July 12, 1924, and March 13, 1932, the vessel was given the number "970-A" to the owners [R. pp. 134-135]. He also produced a book called "Alien-owned and American-built Vessels", in which this vessel was entered as an *"American built and alien Japanese owned vessel"* and showed that she paid *"light money"* from July 12, 1924, to March 13, 1932 [R. pp. 135-148].

Continuation Ozawa's Testimony.

The witness Kakichi Ozawa was recalled, and he testified that the Japanese Government assumed responsibility for vessels named in the book, and that *"other* rules of our Government must make protection of the Japanese subject and the Japanese vessels when they are out of the County" [R. p. 148]. He said that the book did not contain vessels owned by Japanese in *foreign* countries [R. p. 149].

Admission of Place of Seizure.

The trial court stated that he was inclined to the view that if the vessel was an alien vessel, that under the decision in *Cook v. United States,* 288 U. S. 102, the seizure "would be regarded as unlawful", and that the remaining

question was, "Is the vessel to be regarded as an alien boat?" [R. p. 150]. He then stated, "We understand" that it is not disputed that the vessel was *"seized more than one hour's sailing distance from shore"* and the U. S. Attorney replied, *"No, Your Honor"*. The trial court then stated that he found himself very much "in doubt upon that question and is inclined to believe that the laboring oar, so far as convincing the court is concerned, *still rests with the Government"* [R. p. 150].

Ruling Collector's Records Persuasive.

The trial court, in commenting upon Metcalf's testimony, said that the records produced by him were *"persuasive"* to the extent of showing that the Collector of Customs. Marine Branch, *"one branch of the Government has treated the vessel in question as a foreign boat"*, and added that "the only basis for asserting jurisdiction here arises out of the circumstances with the numbering of this vessel", and then said that "when we come to inquire into the records of that department, we find that in so dealing with this boat their activities were with the view of dealing with a *foreign* vessel and not with a vessel either belonging to a citizen of the United States or registered or licensed under the laws of the United States or amenable to its jurisdiction, except to the same extent and no further than any other alien vessel" [R. pp. 151-152]. He said that he mentioned all that "in order that the Government's counsel may be apprized of the trend of thought on the part of the court and indicate the point respecting which any additional authority, if presented, should be directed" [R. p. 152]. The trial court then inquired of the libelant's counsel whether "we in sub-

stance, at least, stated the Government's position", and the proctor for libelant replied, *"Yes,* Your Honor. I think that the court and Government counsel are entirely in accord on the question to be covered by the law" [R. p. 152].

Admission Numbering Vessel Was Unlawful.

On March 24, 1933, the case came up for argument. The proctor for the libelant stated that if the "Patricia" is a Japenese vessel, she is "within the protection of this treaty", and added, "then I believe that (appellant's) counsel's point as to the jurisdiction is well taken under the Cook case" [R. p. 154]. He then called the trial court's attention to the *"exchange of notes"* attached to said Convention between the United States and Japan of January 16, 1930, 46 U. S. Stat., at page 2449, which reads in part as follows, to-wit: "It is understood—1. That the term *'private vessel',* as used in the Convention, signifies all classes of vessels other than those owned and controlled by the Japanese Government and used for Governmental purposes, for the conduct of which the *Japanese Government assumes full responsibility."* (Italics ours.) He then argued "that the private vessels must be under the Japanese flag" [R. p. 156]. He contended that because "there was no flag of any kind on board of the 'Patricia', nor had she ever displayed a flag", and because there "is no assumption of responsibility on the part of the Empire of Japan for the operations and activities of this vessel," and although the vessel was "owned by a Japanese in the United States", the vessel was not entitled to the benefit of the treaty [R. pp. 156-158]. However, he frankly *admitted* that "in my opinion, that pro-

cedure, that method of handling alien-owned boats, has grown out of lack of knowledge of the navigation laws on the part of the clerical force which has been given the authority to execute those laws. *I have been unable to find any authority for their issuing a number to a vessel owned by an alien"* [R. p. 159], and avowedly *admitted* that *"when the Collector of Customs does issue a number to this boat, if in fact it is a foreign boat, I think he exceeds his authority"* [R. p. 160].

Order Dismissing Libel.

On March 30, 1933, the trial court made an order reciting that the vessel was seized at a point between 10 and 11 miles from the coast; that her maximum speed was not exceeding 8 miles per hour; that she is owned by a subject of the Empire of Japan; that she is undocumented; that the Collector of Customs allotted a number to her *"as an alien vessel";* that she was subjected to and required to pay light money; and that "the court finds said vessel was seized in *contravention* of the treaty entered into between the United States and Japan, and upon the authority of *Cook v. United States,* 288 U. S. 102, he adjudged and ordered that the order heretofore made denying the motion to quash and dismiss the proceedings be vacated, and that "the libel against said vessel, its equipment and cargo, is dismissed, and directed the proctor for appellant to prepare and serve a decree in conformity therewith" [R. p. 161].

Findings of Fact Dismissing Libel.

The trial court made the following findings of fact: that the vessel was seized on March 23, 1932, on the high seas at a point between 10 and 11 miles off the coast (Find. I); that she was towed to the Base in the Harbor of Los Angeles (Find. II); that the Collector of Customs adopted the seizure (Find. III); that subsequently the Collector of Customs caused the appraisal of the vessel and cargo (Find. IV); that on April 28, 1932, the United States Attorney, at the request of the Collector of Customs, instituted this libel against the cargo and vessel (Find. V); that at the time of the seizure, the vessel bore the number "970-A" (Find. VI); that the vessel was built in 1925 by Japanese at Terminal Island, California, for citizens of Japan (Find. VII); that up to the time appellant acquired title of the vessel, she was continuously owned by a citizen of Japan (Find. VIII); that about March 15, 1932, appellant purchased the vessel and is the sole and exclusive owner (Find. IX); that appellant is an alien and a citizen of the Empire of Japan (Find. X); that the measurements of the vessel are 82 feet, length; 18.5 feet, breadth; 8.75 feet, draft loaded, and equipped with a Fairbanks-Morse Engine, 1924, 100 horsepower, and her maximum speed is 7.9 nautical miles per hour (Find. XI); that at the time of the seizure there was no other vessel in contact with her and that she could not traverse within one hour from the place of seizure to the nearest coast (Find. XII); that the Collector of Customs entered her as an *alien* vessel and she was subjected to and required to and did pay light money since she was built (Find. XIII); that at the time and place where she was seized, she did not violate any of the laws of the

United States (Find. XIV); that she is not an American vessel (Find. XV); that she did not violate Section 4377, R. S., 46 U. S. C. A. 325 (Find. XVI); that the failure to produce the manifest was not a violation of Section 584 of the Tariff Act of 1930, 19 U. S. C. A. 1584 (Find. XVII); that appellant did not knowingly and fraudulently use the number allotted to the vessel (Find. XVIII); that the seizure was made in contravention and in violation of the Convention between the United States and Japan proclaimed January 16, 1930, 46 U. S. Stat., 2446-2449 (Find. XIX); and that the libelant failed to prove by credible evidence the allegation of the libel of information (Find. XX) [R. pp. 162-166].

Conclusion of Law Dismissing Libel.

The trial court found as conclusions of law that from the time the vessel was built she was an alien owned American-built vessel (Con. A); that by the collection of light money and the entry in the books of the Collector of Customs that the vessel was an alien owned vessel, the libelant well knew at the time of the seizure that she was an alien owned vessel (Con. B); that the seizure was in contravention and in violation of the Convention between the United States and Japan proclaimed January 16, 1930, 46 U. S. Stat., 2446-2449 (Con. C); that the seizure was unlawful, illegal and in violation of law (Con. D); that appellant is entitled to judgment directing that the minute order of October 13, 1932, overruling his objection to the jurisdiction of the court and denying the motion to quash be annulled, vacated and set aside; that each of the counts of the libel be dismissed upon the merits; that appellant was entitled to the return of the vessel and her

cargo; and that, upon the service of a certified copy of the decree, the commandant of the Coast Guard Base deliver the vessel to appellant to make an examination as to her seaworthiness and repairs if necessary, and thereafter, he shall, at his own cost and expense, return the cargo, and place it on board of the vessel, and permit her to proceed on the high seas, and assign a convoy to accompany her on the trip to protect her from seizure, in order that she may safely arrive at the place of seizure, and then to permit her to proceed on the high seas wherever she may desire to go without any hindrance, interference or molestation [R. pp. 167-169].

Decree Dismissing Libel.

The decree is dated June 28, 1933, and was recorded on June 29, 1923 [R. p. 172], and follows the conclusions of law and directs that the libel be dismissed upon the merits [R. pp. 170-172].

Libelant's Motion to Vacate Decree.

Thereafter, the libelant presented a motion to vacate the final decree and the findings of fact and conclusions of law, upon the ground that the evidence did not support the findings of fact and conclusions of law, and that the conclusions of law are contrary to law [R. pp. 173-174].

Answer to Libelant's Motion to Vacate Decree.

Appellant filed an answer alleging that the motion to vacate the decree was in effect for a *"new trial"* and cannot be entertained because there is no *statute* providing

for such relief, and that the findings of fact are supported by an overwhelming amount of evidence, and that the conclusions of law are not contrary to law [R. p. 175].

Orders Vacating Decree.

On August 21, 1933, the trial court made an order reciting that it appearing that the time to *appeal* from the decree would likely expire before a decision may be made upon the motion to vacate the decree, he directed that the findings of fact, conclusions of law and decree be vacated, and set the case down for October 2, 1933, for further hearing [R. p. 176].

(NOTE: The time to appeal would not have expired until September 29, 1933, which was one month and eight days from the date of said order.)

On September 15, 1933, the trial court made an order modifying said order, reciting that the cause was continued for further argument on the merits with particular reference to the question whether the vessel is entitled to the benefits of the Convention between the United States and Japan of January 16, 1930 [46 U. S. Stat. p. 2449; R. p. 177].

Ruling Changing Burden of Proof.

On October 2, 1933, the trial court, after reading his order of August 21, 1933, stated that "but for the Treaty the Government was entitled to proceed as it had done in this case" [R. p.181]. He said that it was his thought that this case "came within the accepted class defined" by the *Cook* case, and added that further reflection raised the question that the *Cook* case was interpreting and ap-

plying the treaty between the United States and Great Britain, "the language of which, however, is substantially the *same* as the language of the Treaty with Japan and the purpose of each of these two treaties was identical" [R. p. 182]. He stated that the libelant advanced the contention that except for such a treaty, it was entitled to proceed in the manner in which it had, and that "the labor is upon the party *claiming* the benefits of the exception contemplated by the Treaty" [R. p. 182]. He further stated that there was considerable force in the Government's contention, and that "it is incumbent upon the *respondent* to show that under the record, as we have it here, this respondent is entitled to the benefits of the Treaty" [R. p. 182]. That ruling is directly contrary to his previous ruling that the burden was on the libelant [R. p. 150].

Exceptions to Orders Vacating Decree.

Appellant called attention that the trial court did not grant appellant *exceptions* to the orders made on August 21, 1933, and September 15, 1933, and asked that exceptions be entered in the minutes of the court *nunc pro tunc* as of said dates [R. pp. 182-183] and the trial court granted that request [R. p. 183].

Motion to Vacate Orders Vacating Decree.

Appellant moved to set aside said orders which vacated the decree on the ground, among others, that they were made without authority in law and contrary to precedence; that the precise question was passed upon by the trial court *several* times before the decree dismissing the libel was entered; that the judgment in the criminal action

which he made and of which he would take judicial notice was in effect an acquittal, and was therefore *res adjudicata* on the points involved [R. pp. 184-187]. The trial court directed to file briefs and reserved decision on said motion [R. p. 188].

Order for Forfeiture.

On April 6, 1934, the trial court made an order reciting, among other things, that appellant is a subject of the Empire of Japan and the owner of the vessel; that she was built in the United States; that for several years prior to the seizure, appellant maintained a home and was domiciled in the United States, and directed forfeiture on Counts 2 and 3, and dismissed Count 1, and directed that the findings and decree be prepared in conformity therewith [R. pp. 178-180].

Appellant's Proposed Findings of Fact.

On May 16, 1934, appellant submitted proposed findings of fact and conclusions of law requesting the trial court to find [R. pp. 190, 208] as follows: That in 1924, K. Uyeji and O. Uyemoto, citizens of Japan, built the vessel at Terminal Island, California (Find. 1); that the Collector of Customs entered her in his book as an American built and alien Japanese owned vessel and allotted her the number, "970-A" (Find. 2); that on July 11, 1930, the said K. Uyeji and O. Uyemoto sold said vessel to George Kioo Agawa, a citizen of Japan, and the Collector of Customs entered said sale in his book and allotted her said number (Find. 3); that on March 13, 1932, said George Kioo Agawa sold said vessel to appellant, a citizen of Japan, and the then Collector of Customs en-

tered said sale in his book and allotted her said number (Find. 4); that the measurements of said vessel are 82 feet length, 18.5 feet breadth, 8.75 feet draft loaded, and at the time of the seizure she was equipped with a Fairbanks-Morse Engine of 1924 of 100 horsepower (Find. 5); that her maximum speed at the time of the seizure was 7.9 nautical miles per hour (Find. 6); that between July 12, 1924, and March 18, 1932, said owners paid "light money" to the Collector of Customs, which he demanded (Find. 7); that on March 23, 1932, the revenue cutter CG-259 of the United Section Base 17, was on the high-seas in search of a reported capsized vessel and overtook the "Patricia" and noticed that she was loaded below her water-mark and he then placed a seaman, first class, on board, and later searched her without a warrant or other process and when he got on board, he opened her hatchways and found that she was loaded with sacks containing spirituous liquors and thereupon, he arrested appellent and his crew and seized the vessel and cargo (Find. 8); that at the time of the seizure, the vessel bore on her stern the number "970-A", and the letters "L A" (Find. 9); that the vessel was seized between 10 and 11 miles southwest true from San Mateo Rock off San Juan Point, California (Find. 10); that the place of seizure was ascertained by dead reckoning, running from the position where the revenue cutter started at point of San Clemente Island in search of the reported capsized vessel (Find. 11); that at the time of the seizure, there was no vessel or vessels near her or anywhere in sight of her (Find. 12); that the vessel could not sail under her own power within one hour from the place of seizure to San Mateo Rocks off San Juan Point, which was the nearest point of land of the

United States (Find. 13); that after the vessel was seized, she was towed to Section Base 17, San Pedro, California (Find. 14); that after the vessel was at said Base, under said seizure, the Collector of Customs, District No. 27, adopted said seizure (Find. 15); that thereafter the said Collector of Customs took possession and custody of the vessel and her cargo (Find. 16); that thereafter the vessel was appraised in the sum of $8,000.00 and the cargo in the sum of $17,490.00 (Find. 17); that on or about April 28, 1932, the United States Attorney, upon the request and instructions of said Collector of Customs, instituted this libel proceeding against the vessel and her cargo (Find. 18); that at the time of the seizure, there was a fog and the vessel drifted in order to enable its master to ascertain his whereabouts and get his bearings (Find. 19); that the said Dwight, in charge of said revenue cutter, did not have a search warrant or any other process authorizing him to go on board of said vessel and search her (Find. 20); that appellant is an alien and a citizen of the Empire of Japan, and incapable of becoming a citizen of the United States (Find. 21); that appellant's domicile is in the City of Nishinomiya, Province of Hyogo, Japan, where he domiciles with his wife and son, and temporarily resides or sojourns at Terminal Island, California (Find. 22); that the treaty between the United States and Japan proclaimed April 5, 1911, 37 U. S. Stat. 1504-1509, provides that the citizen or subject of Japan shall enjoy the most-favored nation treatment in the territories of the United States (Find. 23); that the Convention between the United States and Japan proclaimed January 16, 1930, 46 U. S. Stat. 2446-2449, provides that the seizure shall not be made unless she can traverse

within one hour from the place of seizure to the nearest coast of the United States (Find. 24); that the seizure took place on the high seas outside of 3 marine miles from the coast of the United States (Find. 25); that the Collector of Customs had no power or jurisdiction to allot and give said vessel said number, and that the giving of said number did not attach to her the same dignity as would have been the case if her owner had been a citizen of the United States (Find. 26); that appellant appeared specially and made an application to set aside the seizure on the ground, among others, that the seizure was illegal, unlawful, and that the court did not acquire jurisdiction for the reason that appellant was a subject of Japan and her nationality is deemed that of her owner (Find. 27); that the issues raised on the application to set aside the seizures was tried in open court and witnesses were examined and cross-examined, and resulted in making of a minute order overruling said objection (Find. 28); that on May 4, 1932, the Grand Jury indicted appellant and his crew. That thereafter he appeared specially and objected to the jurisdiction of the court and moved to quash said indictment upon the ground, among others, that his arrest was illegal, unlawful and inviolation of said Convention; that application resulted in a minute order denying said application; that thereafter, appellant moved, upon the testimony and proceedings had in this proceeding for a rehearing of said application to quash said indictment, and that application was granted and the said indictment was quashed, and that a judgment was entered thereon and the time within which to appeal therefrom had expired, and no appeal was taken and said judgment is in all respects final and conclusive (Find. 29); that appellant

requested the trial court to take judicial notice of the order and judgment entered in the said criminal action, which was a bar in this proceeding on the issue that the seizure was illegal, unlawful and in violation of said Convention (Find. 30); that on or about June 28, 1933, the trial court made said findings of fact and conclusions of law and said decree dismissing the libel upon the merits, and directed the return of the vessel and cargo to appellant (Find. 31); that the trial court made a minute order on August 21, 1933, which was modified by the minute order of September 15, 1933, vacating said findings of fact and conclusions of law and decree, and continued this cause for further hearing on the merits as to whether the vessel is entitled to the benefits of said Convention (Find. 32); that on January 29, 1934, appellant moved to dismiss the libel on the ground that on December 5, 1933, the 21st Amendment to the Constitution of the United States was proclaimed which repealed the 18th Amendment of the Constitution, and by reason thereof, the libel abated that the court had no jurisdiction (Find. 33). [R. pp. 191-201.]

Appellant's Proposed Conclusions of Law.

The appellant requested the trial court to find conclusions of law [R. pp. 190, 208, 202] as follows: That when the vessel was built her nationality was Japanese (Con. A); that appellant, by purchasing the vessel, became her sole and exclusive owner (Con. B); that appellant is a citizen of the Empire of Japan (Con. C); that when appellant became the owner of the vessel, her nationality was that of appellant (Con. D); that the Collector of Customs, in entering the vessel as an American

built and alien Japanese owned vessel, precluded libelant from disputing that fact (Con. E); that the Collector of Customs, in demanding and receiving annually light money, precluded the libelant from disputing the fact that her nationality is Japanese (Con. F); that the statute authorizing the giving of a number to a vessel contemplated and was intended to apply to vessels owned exclusively by citizens of the United States and not to an American built and alien Japanese owned vessel (Con. G); that the Collector of Customs had no right or authority to give the vessel said number (Con. H); that the giving of said number to said vessel did not attach any dignity to her nor convert her into a vessel of the United States (Con. I); that the number on the vessel and the letters "L A" painted did not attach any dignity to her nor signify that she was a vessel of the United States as contemplated by law (Con. J); that appellant's domicile in Japan was not changed by his residence within the United States (Con. K); that appellant's residence within the United States is deemed temporary and not permanent (Con. L); that the fact that the vessel was loaded below her water-mark did not empower or authorize to go on board her and search her without a warrant or process (Con. M); that the search of the vessel was in violation of the 4th and 5th Amendments of the Constitution of the United States (Con. N); that the search of the vessel without a warrant, and her seizure were null and void, illegal and unlawful (Con. O); that the search and seizure outside of 3 marine miles from the coast constituted a violation of Article I of said Convention (Con. P); that the search and seizure of said vessel on the high seas was in violation of Article II of said Convention, because the

vessel was incapable of sailing under her own power within one hour from the place of seizure to the nearest point of land of the United States (Con. Q); that the flying of a flag is merely notice to which nationality the vessel belongs but is not evidence of that fact (Con. R.); that the failure of the vessel to fly the Japanese flag did not authorize the boarding her nor justify her seizure (Con. S); that the nationality of the owner of the vessel and not the flying of a flag determines her nationality (Con. T); that all proceedings based on said search and seizure are null and void, contrary to law, and are of no legal force or effect (Con. U); that the adoption of the seizure by the Collector of Customs is null and void and of no legal force or effect (Con. V); that all proceedings based upon the adoption of the Collector of Customs are null and void and of no legal force or effect (W); that the said judgment in the criminal action precluded libelant from disputing the nationality of said vessel as being a Japanese vessel (Con. X); that appellant did not violate any Statute or law of the United States which subjected him to the payment of a penalty (Con. Y); that appellant, at the time of the seizure, did not violate any Statute or law of the United States which subjected him to the payment of a penalty (Con. Z); that the vessel did not violate any Statute or law of the United States which subjected her to the payment of a penalty or condemnation or forfeiture (Con. AA); that the vessel, at the time of the seizure, did not violate any Statute or law of the United States which subjected her to the payment of a penalty or condemnation or forfeiture (Con. BB); that upon the adoption of the 21st Amendment to the Constitution of the United States, which

repealed the 18th Amendment, this action abated, and thereby arrested the jurisdiction of this court, except to order this action to be dismissed with direction to return to appellant the vessel and cargo (Con. CC). [R. pp. 202-207].

Ruling on Proposed Findings.

On August 10, 1934, the trial court made an omnibus ruling refusing to find each and all of the appellant's proposed requests "except that the same are already incorporated in the findings and conclusions signed and filed on the date of August 9, 1934," with an exception to appellant [R. p. 208].

Order on Settlement of Findings.

On August 2, 1934, the trial court made an *ex parte* order reciting that appellant questioned some of the findings proposed by libelant as being unsupported by evidence; that the libelant was prepared and desired to submit evidence upon the matter that the Collector of Customs did not request to libel the cargo; that no claim was filed with him for the cargo; that he destroyed the cargo except 5 cases he retained as evidence; that the U. S. Marshall did not arrest or attach the cargo and that no claim was ever filed for the cargo, and vacated the submission and set the cause down for further hearing [R. pp. 209-210].

Exception to Order on Settlement of Findings.

On August 7, 1934, appellant requested that he be granted an exception *nunc pro tunc* as of August 2, 1934, the date when said order was made, and the trial court granted that request [R. p. 211].

Motion to Vacate Order on Settlement of Findings.

Appellant moved to set aside the order of August 2, 1934, upon the ground that the matters recited therein were not *issues* raised by the pleadings, and for that reason, the evidence could not be taken [R. pp. 211-212]. The trial court denied said motion with an exception to appellant [R. p. 212].

Libelant's Evidence on Settlement of Findings.

The libelant called as its witness Charles W. Salter, Assistant Collector of Customs since June 22, 1925 [R. p. 212]. He produced two documents, purporting to have been made by Frederick J. Dwight, the seizing officer. These documents were on "Customs Form 5955." One is numbered 11,799 [Exhibit 2, R. pp. 219-222] and the other is numbered 11,800 [Exhibit 1, R. pp. 214-216]. They are substantially alike, except they bear different notations, presumably made by other persons than the seizing officer [R. pp. 219-222, 214-216]. They both contain a pencil notation *"Jap 970 A"*, indicating that he seized a *Japanese* vessel [R. pp. 216-222]. They were received in evidence over appellant's objection and exception [R. pp. 213, 217]. Salter testified that he sent a copy of report "11,800" with a letter to the then U. S. Attorney [R. p. 224]. The letter was received in evidence over appellant's objection and exception [Exhibit 3, R. pp. 224-225]. The letter requested the then U. S. Attorney to institute a libel proceedings against one *"American* Oil-Screw Patricia" for violation of "R. S. 4337, 4377, and Sections 584 and 593 of the Tariff Act" and made no specific mention of the cargo [R. pp. 225-226]. The naming her as an *"American"* was a deliberate *false* state-

ment because he knew or should have known that she was entered and numbered in his office as an *"alien Japanese"* vessel and paid *"light money"* for eight years [R. pp. 133-148, 151-152, 161]. The libelant then read into the record the U. S. Marshal's return of the monition over appellant's objection and exception [R. pp. 226-228]. Salter *admitted* that the cargo was turned over to the Collector of Customs for safe keeping [R. p. 228]. The libelant then offered in evidence a letter dated July 28, 1933, addressed to the *successor* of the U. S. Attorney [R. pp. 229-230]. Appellant objected to the introduction in evidence of that letter on the ground, among others, that it was *"a self serving declaration."* That objection was overruled with an exception to appellant, and the letter was received in evidence [Exhibit 4, R. pp. 230-234]. Salter, in that letter, stated that it was a *"memoranda relative to the facts concerning the seizure"* [R. p. 230], but a cursory persual will show that it is in fact a *accusation* against the former U. S. Attorney, and an attempt to justify the *unlawful* destruction of the cargo. It is not alone misleading, but the charge made against the former U. S. Attorney is false. Salter, in that letter, stated that the former U. S. Attorney erred in instituting this libel against the *cargo* and vessel, but that it should have been against the vessel alone [R. p. 233]. That is a *false accusation.* The Statute made it *mandatory* upon the former U. S. Attorney to file a libel against both the *cargo* and vessel (Point 17, p. 71, *infra*). He stated in the letter that the cargo "never came into the custody of the court" [R. p. 234]. That is also a false statement because he knew or should have known that the Statute *commanded* the Collector of Customs

that the cargo *"shall be placed and remain"* in *his* custody to *"await disposition according to law"* (§605 Tariff Act 1930; 46 U. S. Stat., Part I, p. 754; Point 40, pp. 115-117, *infra*). Salter, in that letter also stated that before he ordered the destruction of the cargo, he *communicated* with the then U. S. Attorney "with a view to determining what quantity, if any, was desired by that officer to be held as evidence" [R. p. 232], but failed to produce the *"communication"* to substantiate that statement. It is needless to say that the former U. S. Attorney was a man well learned in the law, as that is undoubtedly known to this court. He surely would not advise the Collector to destroy the cargo pending this libel proceeding, and thus *violate* the express provisions of the Statute, and the accusation against that learned gentleman by innuendo is unworthy of consideration, if not censurable. Salter, in that letter, further stated that the cargo *"was disposed of in accordance with the law"* [R. p. 234]. That statement is likewise false, because the cargo could only be destroyed by a provision in the *decree made upon request of the Secretary of the Treasury* (§619 Tariff Act 1930, 46 U. S. Stat., Part I, p. 755; Point 40, pp. 115-117, *infra*). These misleading statements and false accusations were evidently made by Salter in the hope that the trial court would believe it as true, and thus open an avenue to the Collector of Customs justifying the destruction of the cargo in violation of the Statute. It will be noted that previously Dwight testified that he made *one* seizure, that is to say, of the vessel and everything on board, including the cargo [R. p. 76]. Salter, on cross-examination *admitted* that the cargo was seized simultaneously with the vessel, and that he gave orders to remove it

and place it in a warehouse [R. pp. 236-237]. He was asked whether or not it was a fact that Dwight made one seizure. The trial court characterized that question, and remarked that it was perfectly obvious that he did not know that, although on direct examination Salter was permitted to testify over appellant's objection and exception that there were *two* seizures made [R. p. 217]. Salter admitted that between certain dates he learned of the pendency of this proceeding [R. pp. 252-253]. The trial court characterized the inquiry and stated that counsel would be permitted to bring out facts, but *"not to conduct a school of instructions"* [R. p. 253]. It is very obvious that the trial court either overlooked or ignored that he permitted libelant to introduce in evidence the letter dated *July 8, 1933,* in which Salter made *ex parte* declarations intending to convey the fact that there were two *separate seizures* [R. pp. 230-234]. It will not be amiss to call attention that the trial court later remarked that he will not be *governed* by the statements of Salter's letter [R. p. 254]. It is significant to note at this point that the trial court made a very *important* finding based on that letter, namely, that the Collector of Customs requested the then U. S. Attorney to file a libel against the vessel and not the *cargo* [Find. V, R. p. 313]. It is also significant to note at this point that the trial court made a very important *conclusion* of law based on that letter, namely, that the cargo *"did not come within the jurisdiction of this court, in this libel proceeding and was rightfully and lawfully disposed of"* by the Collector of Customs [Con. I, R. p. 319]. The present U. S. Attorney who succeeded the former U. S. Attorney, *admitted* that the cargo was destroyed *without* an order of the court [R. p. 256]. Thereupon, the libelant rested [R. p. 258].

Appellant's Evidence on Settlement of Findings.

Appellant offered in evidence the judgment-roll in said criminal action. Libelant objected on the ground that it was immaterial and no proper foundation was laid. Appellant's proctor stated that he called the court's attention to that judgment in several briefs and asked the court to take judicial notice thereof, and pressed his offer. The trial court sustained the objection with an exception to appellant [R. p. 258]. The judgment-roll was then marked for identification as Exhibit A [R. p. 258] and a narrative statement thereof is in the Apostles on Appeal [R. p. 259]. It shows in substance that appellant and his crew were indicted on three counts. They appeared specially, objected to the jurisdiction of the court, and moved to quash the indictment, and that motion was denied. Subsequently, appellant moved to set aside that order and reopen the motion to quash the indictment, which was based upon the evidence taken on the motion to quash the libel in *this* proceeding, and the order directing the dismissal of the libel, and that motion was granted and an order entered thereon *quashing* the indictment, and subsequently a judgment was entered accordingly [R. p. 259].

Evidence of Appellant's Domicile.

Appellant was called as a witness in his own behalf [R. p. 263]. He testified that he was the claimant in this proceeding; that he was born on December 1, 1891, in the City of Osaka, Japan; that his parents were Japanese; that he is not a citizen of the United States; that he entered this country on May 13, 1929, from Yokohoma, Japan, under a passport, which he produced

in court; that he was married 13 years ago in Japan; his wife's name is Sumi; that they have one child, a boy named Hiroshi; that he lives at No. 90 Ikadcho, in the City of Nishinomiya, province of Hyozo, Japan [R. p. 263]. He was asked whether that was his domicile, and he answered in affirmative. Thereupon, the trial court, on his own motion, struck out his answer, and stated, "What is or is not a domicile, under this proceeding becomes a question of *law*" [R. p. 263]. He then testified that that was his home where he lived [R. p. 263], and that is where his family lived for over 11 years; that he stayed in San Pedro for about 5 years since he came from Japan [R. p. 264]. He said that his *permanent* home was in Japan, and that he was *temporarily* living at San Pedro [R. p. 264].

Evidence Elicited by Trial Court.

The trial court then interrogated the witness at great length [R. pp. 265-275], upon the matters recited in the order dated August 2, 1934, made on the settlement of the findings [R. pp. 209-210], the title to the vessel, the voyage when the vessel was seized, the seizure of the vessel and his claim to the cargo [R. pp. 265-275].

Specification of Errors.

The appellant assigned *100* errors on this appeal [R. pp. 328-355]. To recite them here would unduly prolong this brief. The appellant, in the first paragraph after the heading of each point, referred to the error of the point it relates. This was done for the sake of brevity and for the convenience of the court. It is hoped that will meet with the approval of the court.

POINT 1.

It Is Undisputed that Appellant's Nationality Is Japanese.

The *undisputed* evidence is that appellant was born in Japan; his parents were Japanese; he is not a citizen of the United States and entered this country under a passport [R. pp. 51, 263].

The trial court found as a fact based on that evidence, that appellant is *"a subject of the Empire of Japan"* [Find. XII, R. p. 315].

The place of *birth* determines the nationality of the person.

> *United States v. Wong Kim Ark,* 169 U. S. 649, 656.

The evidence that appellant was born in Japan raised the presumption that he is a subject of Japan.

> *Hauenstein v. Lynham,* 100 U. S. 483.

That presumption continues "until a change of nationality is proved."

> *City of Minneapolis v. Reum,* 56 Fed. 576.

There was *no* evidence introduced showing that appellant's nationality was changed. Indeed, no such evidence could be offered because appellant was ineligible of becoming a citizen of the United States.

> 8 *USCA,* §359;
>
> *Morris v. California,* 291 U. S. 82, 85.

POINT 2.

It Is Undisputed That the Collector of Customs Entered the Vessel's Nationality as Japanese.

The trial court made *no* finding of the nationality of the vessel upon which the decree appealed from was entered. The trial court, on the trial, ruled that the evidence was persuasive, that the Government treated the vessel as a *foreign* vessel by subjecting her to pay light money and numbering her as a *foreign* vessel [R. pp. 151-152]. Subsequently, the then U. S. Attorney *admitted* that the Government had no right to number a *foreign* vessel [R. pp. 159-160]. Thereafter, the trial court made an order reciting that the number allotted to the vessel was allotted to her *"as an alien vessel"* [R. p. 161]. Thereafter, he made findings in which he found as a fact that it was not true that she was an American vessel [Find. XV, R. p. 165], which he subsequently set aside [R. pp. 176-177].

The *undisputed* evidence is that appellant is the owner of the vessel and is a subject of Japan [R. pp. 51, 263]. The trial court found that as a fact [Find. XII, R. p. 315]. That finding impliedly or inferentially is equivalent to a finding that the nationality of the owner is the nationality of the vessel.

It is well settled that the nationality of a vessel is that of her owner.

The Alta, 136 Fed. 513, 519;

United States v. Gordon, 25 F. Cas. No. 15, 231;

The Merritt, 84 U. S. (17 Wall.) 582;

The Chiquita, 19 F. (2d) 417, 418;

United States v. Rodgers, 150 U. S. 249, 260;

United States v. Holmes, 18 U. S. (5 Wheat.) 412;

People v. Taylor, 7 Mich. 161, 209;

United States v. The Pirates, 18 U. S. (5 Wheat.) 184, 199;

United States v. Jenkins, 26 Fed. Cas. No. 15,473;

United States v. Jenkins, 26 Fed. Cas. No. 15,473 A;

Jenks v. Hallet, 1 Cai. N. Y. 60;

Chartered Mercantile Bank v. Netherlands India Steam Nav. Co., 10 Q. B. D. 521, 535;

The Tommi (1914), P. 251, 256;

Regina v. Bjornsen, 10 Cox C. C. (Eng.) 74;

International Nav. Co. v. Lindstrom, 123 Fed. 475, 476;

58 *C. J.* 30, Note 4;

16 *C. J.* 170, Note 16;

36 *Cyc.* 12, Note 2;

25 *Am. & Eng. Ency. of Law* (2d), pp. 863, 864;

Point 29, pp. 93-97, *infra.*

POINT 3.

The Seizure of the Vessel Was in Violation of the Convention Between the United States and Japan of January 16, 1930, Because It Was Undisputed That Appellant Is a Subject of Japan and Owner of the Vessel, and the Seizure Was Made More Than One Hour Sailing Distance From the Coast and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that the nationality of the vessel is that of her owner, and therefore she is deemed to be a Japanese vessel [Find. 27, R. pp. 198-199]; that the Convention between the United States and Japan prohibited the seizure of a vessel unless she is capable of traversing in one hour from the place of seizure to the nearest point of land of the United States [Find. 24, R. pp. 197-198]; that she was incapable of traversing that distance within that time [Find. 6, R. p. 192; Find. 13, R. p. 194]; and as a conclusion of law that the seizure was in violation of said Convention [Con. Q, R. p. 205], which he refused with an exception to appellant [R. p. 208]. He instead found that the seizure was "lawful and proper under the laws of the United States" [Con. II, R. p. 319]. Appellant assigned that as error [Errors 25, R. p. 335; 22, R. p. 334; 6, R. p. 329; 12, R. p. 331; 48, R. p. 341; 78, R. p. 347].

The *undisputed* facts bearing on that branch of the case is that appellant is a subject of Japan and the owner of the vessel [R. pp. 51, 263, 264]; that her maximum speed, loaded, is 7.9 nautical miles per hour [R. pp. 98, 99]; that she was incapable of traversing within one hour from the place of seizure to the coast [R. pp. 269, ...], and the U. S. Attorney *admitted* that she was

"seized more than one hour's sailing distance from shore" [R. p. 150].

The trial court found as a fact that appellant is a subject of Japan and the owner of the vessel [Find. XII, R. p. 315). He made *no* finding as to her nationality, except the order dismissing the libel recites that she was an alien vessel [R. p. 161] and in the findings, found as a fact that she was not an American vessel [Find. XV, R. p. 165], which he subsequently vacated [R. pp. 176-177]. These undisputed facts show that the seizure was in *violation* of the Convention between the United States and Japan.

The Convention between the United States and Japan proclaimed January 16, 1930, [46 U. S. Stat., 2446-2449], insofar as it is material to the point under discussion reads as follows, to wit:

"ARTICLE I.

The High Contracting Parties declare that it is their firm intention to uphold the principle that *three* marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters.

ARTICLE II.

(1) The Japanese Government agree that they will raise no objection to the boarding of *private* vessels under the Japanese flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions, in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those

on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions, in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be initiated.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions, prohibiting the importation of alcoholic beverages, the vessel may be seized and *taken into a port* of the United States, its territories or possessions, for *adjudication in accordance with such laws.*

(3) The rights conferred by this article *shall not be exercised at a greater distance from the coast of the United States, its territories or possessions, than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense.* In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions, by a vessel other than the one boarded and searched, it shall be the speed of such other vessel, and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised."

* * * * * * * * *

"That the term 'private vessels' as used in the Convention signifies *all* classes of vessels other than those owned or controlled by the Japanese Government and used for Governmental purposes, for the *Conduct of which the Japanese Government assumes full responsibility.* * * *" (Italics ours).

A treaty between the United States and a foreign country is the "supreme law of the land".

U. S. Const. Art. VI, Subd. 2.

Maiorano v. Baltimore & O. R. Co., 213 U. S. 268, 273.

It is in the nature of, or equivalent to, a legislative enactment.

Whitney v. Robertson, 124 U. S. 190, 194.

"It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States".

Asakura v. Seattle, 265 U. S. 332, 341.

These rules apply to treaties which are self-executing.

Chew Heong v. United States, 112 U. S. 536, 540.

The language of said Convention is the same as between the United States and Great Britain, which was held to be self-executing.

Cook v. United States, 288 U. S. 102, 119.

Treaties must be fairly and faithfully observed.

The Taign Maru, 73 F. (2d) 922, 924.

"Its application to any case and its construction, if construction is needed, are, as with any other law, questions for the court."

Hamilton v. Erie R. R. Co., 219 N. Y. 343, 352.

"Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible,

one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred".

Asakura v. Seattle, 265 U. S. 332, 342.

"The courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress."

United States v. Minnesota, 270 U. S. 181, 202.

"Courts when called upon to act should be careful to see that international engagements are faithfully kept and observed."

Sullivan v. Kidd, 254 U. S. 433, 442.

"The courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms."

Doe v. Braden, 57 U. S. (16 How.) 635, 657.

"To condemn a vessel the restoration of which is directed by a law of the land, would be a direct infraction of that law, and, of consequence, improper."

United States v. Schooner Peggy, 5 U. S. (1 Cranch) 103, 110.

It will be noted that said Convention imposed a territorial *limitation* upon the authority of the Government of the United States to make a seizure. It fixed the condition under which a vessel may be seized and taken into a port for adjudication. That condition is that the vessel can traverse under her own power within one hour

sailing from the place of seizure to the coast of the United States.

The said Convention is in language the same as the Convention between the United States and Great Britain. The latter was recently considered by the Supreme Court, and it was held that the Government lacked *power* to seize a vessel beyond one hour sailing distance from the coast, and that the court lacked *power to adjudicate such vessel.*

In the case of *Cook v. United States,* 288 U. S. 102, the court, per Brandeis, J., said at page 120:

> "As the Mazel Tov was seized without warrant of law, the libels were properly dismissed * * *".

and at page 121:

> "* * * The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the treaty it had imposed a territorial limitation upon its own authority. The Treaty fixes the conditions under which a 'vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with' the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject

the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.

* * * * * * * * *

"Here, the objection is more fundamental. It is to the jurisdiction of the United States. The objection is not met by distinguishing between the custody of the Coast Guard and the subsequent custody of the Marshal. Nor is it lost by the entry of an answer to the merits. The ordinary incidents of possession of the vessel and the cargo yield to the international agreement. * * *"

The finding that appellant was a subject of Japan and the owner of the vessel entitled him to the benefits of said Convention. If the trial court was in doubt about it, he should have applied the well known rule of construction of treaties, namely, that a treaty must be *liberally* construed in favor of the alien.

Nielson v. Johnson, 279 U. S. 47, 51;
Asakura v. Seattle, 265 U. S. 332, 342;
State v. Tagami, 195 Cal. 522, 527.

It was the duty of the trial court to *scrupulously* enforce said Convention, because good faith between nations requires that a Convention *"shall not be reduced to mere scraps of paper".*

The case of *United States v. Ferris,* 19 F. (2d) 925, is worthy of note. In that case the defendants were mem-

bers of the crew of the steamer "Federalship" of English ownership and Panama registry. She was seized by the Government about 270 miles off the west coast territory of the United States. They were indicted for conspiracy to violate the Prohibition and Tariff acts. The defendants interposed pleas to the jurisdiction of the court over their persons. The court in sustaining their pleas, in an opinion per Bourquin, J., said at page 926:

> "Their contention is that the seizure is illegal, in that it is contrary to and prohibited by the Treaty * * * and that because thereof there can be no jurisdiction of their persons against their wills. * * * The prosecution contends, however, that courts will try those before it, regardless of the methods employed to bring them there. There are many cases generally so holding, but none of authority wherein a treaty or other Federal law was violated, as in the case at bar. That presents a very different aspect and case. 'A decent respect for the opinions of mankind', national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed—require that treaties shall not be reduced to mere 'scraps of paper' ".

The trial court, in the findings of fact upon which the decree appealed from is based, made three additional findings of fact than in the findings of fact which he set

aside. He probably opined that these additional findings of fact would distinguish the instant case from the case of *Cook v. United States,* 288 U. S. 102. The additional findings do *not* distinguish the case at bar from the *Cook* case as a matter of law. The first finding is that appellant maintained a home and is domiciled in the United States [Find. XIII, R. p. 315]. That finding is without any evidence to support it, and is contrary to law (See Point 31, pp. 100-101, *infra*). The second finding is that at the time of the seizure, the vessel did not fly the Japanese flag [Find. XVI, R. p. 316]. That finding does not affect her nationality (See Point 29, pp. 93-97, *infra*). The third finding is that she was not entitled to fly the Japanese flag because she did not have a national certificate [Find. XVI, R. p. 316]. That finding does not affect her nationality because if she did not have a certificate, she is still regarded as an alien vessel (See Point 30, pp. 98-99, *infra*). Moreover, the libelant did not plead the laws of Japan nor were they introduced in evidence. The trial court had no legal right to take judicial notice of the laws of Japan (See Point 27, pp. 89-90, *infra;* Point 28, pp. 91-92, *infra*).

POINT 4.

The Seizure of the Vessel Was in Violation of the Treaty Between the United States and Japan of February 21, 1911, Because Appellant Was Entitled to the Same Treatment as a Subject of Great Britain Under the Most Favored Nation Clause and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that under the Treaty between the United States and Japan of February 21, 1911, (37 U. S. Stat., Part 2, pp. 1504-1509), he was entitled to the same treatment as is accorded by the United States to a subject of the most favored nation [Find. 23, R. p. 197), and as a conclusion of law that neither he nor his vessel violated any statutes or laws of the United States which subjected him to payment of a penalty or condemnation or forfeiture of his vessel and cargo [Cons. Y, Z, AA, BB, R. pp. 206-207] and he refused with an exception to appellant [R. p. 208], and instead found as a conclusion of law that the seizure was "lawful and proper under the laws of the United States" [Con. II, R. p. 319]. Appellant assigned that as error [Errors 56-59, R. pp. 342-343; Error 78, R. p. 347].

The said treaty between the United States and the Empire of Japan of February 21, 1911, proclaimed April 5, 1911, (37 U. S. Stat., Part 2, pp. 1504-1509), insofar as it is material to the point under discussion, reads as follows, to wit:

"ARTICLE IV.

There shall be between the territories of the two High Contracting Parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the Contracting Parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be opened to foreign commerce, subject always to the laws of the country to which they thus come."

"ARTICLE XIII.

The coasting trade of the High Contracting Parties is excepted from the provisions of the present Treaty and shall be regulated according to the laws of the United States and Japan, respectively. It is, however, understood that the citizens or subjects of either Contracting Party shall enjoy in this respect most-favored-nation treatment in the territories of the other."

"ARTICLE XIV.

Except as otherwise expressly provided in this Treaty, the High Contracting Parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either Contracting Party has actually granted, or may hereafter grant, to the citizens or subjects of any other State shall be extended to the citizens or subjects of the other Contracting Party gratuitously, if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional."

This treaty "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts".

Asakura v. Seattle, 265 U. S. 332, 341.

The appellant, under the "most favored nation" clause of said Treaty, was entitled to the same treatment as is accorded by the United States to a subject of the most favored nation.

Santovincenzo v. Egan, 284 U. S. 30, 38.

The trial court held that said Convention between the United States and Japan is in language the *same* as the Convention between the United States and Great Britain [R. p. 182]. It was held that under that Convention the Government of the United States *lacked* power to seize a British vessel on the high seas more than one hour sailing distance from the place of seizure nearest to the coast, and that the court *lacked* power to adjudicate such vessel.

Cook v. United States, 288 U. S. 102, 121.

The appellant, under said Treaty between the United States and Japan of February 21, 1911, was entitled to the benefits of the decision in the *Cook* case and to the *same* treatment as is accorded by the United States to a subject of Great Britain.

Santovincenzo v. Egan, 284 U. S. 30, 38.

POINT 5.

The Test Whether Appellant Was Entitled to the Benefits of the Convention and Treaty Is His Nationality and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that he claimed the benefits of said Convention and Treaty [Find. 27, R. pp. 198-199]. The trial court refused to make said finding with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 25, R. p. 335].

What is the *test* of the application of a treaty? There is but one answer to that question, namely, the *nationality* of the person whose property is sought to be condemned

> "Nationality is the link between individuals and the benefits of the law of nations."
>
> *1 Oppenheim Int. L.,* (3d. Ed. 1920), p. 465.

Says Mr. Chief Justice Hughes, the *"test of the application"* of a treaty *"appears to be that of nationality, irrespective of the acquisition of a domicile as distinguished from residence".*

Santovincenzo v. Egan, 284 U. S. 30, 39.

POINT 6.

The Finding That Appellant Was a Subject of Japan Entitled Him to the Benefits of the Convention and Treaty and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that he was entitled to the benefits of said Convention and Treaty [Find. 27, R. pp. 198-199]. The trial court refused to make that finding with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 25, R. p. 335].

The trial court, having found that appellant was a *subject* of Japan, should have found that he was entitled to the benefits of said Convention and Treaty, because appellant's status as a subject of Japan remained unchanged.

The case of *Santovincenzo v. Egan,* 284 U. S. 30, is squarely in point. In that case, the trial court refused to give the benefits of a treaty to an estate of an alien subject. The court in reversing the judgment appealed from, in an opinion per Hughes, Ch. J., said at page 38:

> " * * * The clear import of the provision is that, so long as they retained their status as citizens of the United States, they would be entitled to the guarantee of Article III. The same would be true of Persians permitted to reside here under the Treaty. * * * "

A formal claim of rights under a treaty need not be made in an answer.

Ehrlich v. Weber, 114 Tenn. 711, 726;

Butschkowski v. Brecks, 94 Neb. 532, 535.

The reason for the rule stated is that the Constitution, laws of the United States and treaties are the "Supreme Law of the Land".

U. S. Const. Art. VI, Subd. 2;

Maiorano v. Baltimore & O. R. Co., 213 U. S. 268, 273.

POINT 7.

The Information Did Not Allege That the Seizure Was Made Within One Hour Sailing Distance From the Coast and Therefore Did Not State a Cause of Action and for That Reason the Trial Court Was Without Jurisdiction and That Objection May Be Raised Even for the First Time on Appeal.

Appellant requested the trial court to find as a fact [R. p. 190] that he had no jurisdiction in the premises [Find. 27, R. p. 198], and as a conclusion of law that all proceedings based on the seizure are void [Con. U, R. p. 205], and he refused with an exception to appellant [R. p. 208]. The trial court instead found that he had jurisdiction of these proceedings [Con. II, R. p. 319]. Appellant assigned that as error [Errors 25, R. p. 335; 52, R. p. 342; 78, R. p. 347].

The question whether or not the libel of information stated a cause of action depends upon the question whether

or not the seizure was made more than one hour sailing distance from the coast.

Cook v. United States, 288 U. S. 102;

Point 3, pp. 38-46, *supra.*

The original libel of information did not allege the *place* where the vessel was seized [R. pp. 5-9]. The amended libel of information alleged that she was seized 10½ miles from shore [R. p. 25]. Neither informations alleged that she was seized *within* one hour sailing distance from the coast [R. pp. 5-9, 25-29]. Therefore they did not state a cause of action.

The libel of information must state the *place* of seizure and show that it was *within* the jurisdiction of the United States, and *within* the jurisdiction of the court.

U. S. Sup. Ct. Admiralty Rule 21.

"A libel in a cause of forfeiture must state the facts which give the court jurisdiction."

The Hoppet v. United States, 11 U. S. (7 Cranch.) 389, 394;

The Ada M., 67 F. (2d) 333, 334.

"Jurisdiction must be affirmatively shown on the face of a libel"; it cannot be inferred.

El Oriente, 5 F. (2d) 251, 253.

A libel of information which fails to allege "the vessel was seized at a place from which it could reach the shore in one hour and is therefore demurrable".

The Ada M., 67 F. (2d) 333, 335.

If the libel of information fails to allege that the seizure was made within one hour sailing distance from the coast, it does not allege a cause of action.

Cook v. United States, 288 U. S. 102;

The Ada M., 67 F. (2d) 333, 335;

Henning v. United States, 13 F. (2d) 75, 76;

The Sagatind, 11 F. (2d) 673, 675;

The Over the Top, 5 F. (2d) 838, 844;

The Pictonia, 3 F. (2d) 145, 148;

United States v. Schooner Frances Louis, 1 F. (2d) 1004, 1005.

"It was the duty of the trial court to note such lack of jurisdiction, irrespective of the action of the parties."

28 *USCA* §80;

Woodhouse v. Budwesky, 70 F. (2d) 61, 62;

Williams v. Nottawa Twp., 104 U. S. 209, 212.

There is no presumption in favor of jurisdiction.

Calif.-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 5, 10.

"There is no presumption in favor of the jurisdiction of the courts of the United States."

Ex parte Smith, 94 U. S. 455, 456.

The presumption "is, that a cause is without its jurisdiction unless the contrary affirmatively appears".

Robertson v. Cease, 97 U. S. 646, 649.

"If the jurisdictional facts are not alleged in the pleadings, the judgment or decree while not an absolute nullity, is erroneous, and may upon writ of error or appeal be reversed for that cause".

Calif.-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 5, 11.

Moreover, the libel of information does not allege the *nationality* of the vessel proceeded against. It alleges that the libel is against "American Oil Screw 'Patricia'" [R. p. 25] but the words before the name of the vessel are merely a part thereof and not an allegation of her nationality.

"A libel in rem ought to state the nationality of the vessel proceeded against."

The Falls of Keltie, 114 Fed. 357, 359.

The objection can be taken at any stage of the proceedings.

The Ann, 13 U. S. (9 Cranch.) 289;

The Fideliter, 1 Abb. U. S. Rep. 577;

United States v. One Raft of Timber, 13 Fed. 796, 799;

The Sagatind, 4 F. (2d) 928, 930.

That objection may be raised for the *first* time on appeal.

United States v. One Raft of Timber, 13 Fed. 796, 799.

POINT 8.

The Collector of Customs Had No Power to Enter and Number the Vessel and Her Nationality Was Not Changed by Numbering Her and the Refusal to Find That Was Error.

The trial court in his order dismissing the libel against the vessel found that the Collector of Customs numbered her *"as an alien vessel"* [R. p. 161]. Appellant requested the trial court to find as a fact [R. p. 190] that the Collector of Customs had no authority to number her and that the number did not attach any dignity to her [Find. 26, R. p. 198] and as a conclusion of law that the statute authorizing the numbering of a vessel did not apply to an *alien* owned vessel [Con. G, R. p. 203]; that the Collector had no right to number her [Con. H. R. p. 203]; that the number did not convert her into an American vessel [Con. I, R. p. 203] and that the number appearing on her stern did not attach any dignity [Con. J, R. p. 203]. The trial court refused to make said findings with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 24, R. pp. 334-335; Error 38-41, R. pp. 339-340].

The Collector of Customs, upon the application of an owner or master, may number an undocumented vessel of sixteen feet in length *"owned in the United States"*.

Act June 17, 1918, 40 Stat. 602, 46 USCA §288.

The phrase "owned in the United States" must be construed to mean belonging to a *citizen* of the United States

for the reason that an American built, *alien* owned vessel is required to pay *"light money"* and not a vessel owned by a citizen of the United States.

R. S. §4225, 38 U. S. Stat. 1193, 46 USCA §128.

Also because a vessel over 20 tons enrolled and a vessel less than 20 tons licensed, *"and no others,* shall be deemed vessels of the United States."

R. S. §4311, 1 U. S. Stat. 305, 46 USCA §251.

A vessel belonging *"wholly to citizens"* of the United States *"and no others* may be registered".

R. S. §4132, 46 USCA §11.

A vessel possessing the same qualifications may be licensed.

R. S. §4312, 46 USCA §253.

Moreover, a vessel is regarded as a floating island (*Cunard S. S. Co. v. Mellon*), 262 U. S. 100). A vessel is a part of the territory to which she belongs (*Wilson v. McNamee,* 102 U. S. 572, 574). "Constructively they constitute a part of the territory of the nation to which the owners belong". (*United States v. Rodgers,* 150 U. S. 249, 260). It is very obvious that the Collector of Customs had no power to number the vessel in question.

Furthermore, the U. S. Attorney, at the trial, *admitted* that there is no authority to number an *alien* owned vessel and that the Collector of Customs, in numbering an alien owned vessel *exceeds* his authority [R. p. 159-160].

POINT 9.

The Seizure Should Have Been Quashed Because the Government Had No Power to Make It and the Court to Adjudicate It and the Refusal Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that he made a motion to quash the seizure and that motion was denied [Find. 27, R. p. 198] and he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 25, R. p. 335]. He found that appellant filed the papers on said motion [Find. IX, R. p. 314].

The *undisputed* facts are that appellant appeared *specially,* objected to the jurisdiction of the court and moved to quash the seizure of the vessel and all proceedings based thereon [R. pp. 31-39], upon the ground that she was a Japanese vessel, and the Government had no power to seize her at the place where she was seized [R. pp. 32-33]. These issues were tried in open court [R. pp. 40-41].

The *undisputed* evidence bearing on that branch of the case, is that appellant was born in Japan; that he is not a citizen of the United States; that he is the sole owner of the vessel [R. p. 51]; that she was entered and numbered by the Collector of Customs, Marine Department [R. pp. 134-135], as an *alien* Japanese vessel [R. pp. 141, 143]; that she paid *"light money"* from the time she was built to the date of seizure [R. p. 143]; that her speed, loaded,

is 7.9 nautical miles per hour [R. pp. 98, 99]. The U. S. Attorney *admitted* that she was *"seized more than one hour's sailing distance from shore"* [R. p. 150].

The trial court denied appellant's motion to quash the seizure with an exception to appellant [R. p. 99].

The trial court, upon these undisputed facts, should have quashed the seizure of the vessel and all proceedings based thereon, as a matter of strict legal right, and not of discretion, because:

(1) The Government lacked power to make the seizure and the trial court lacked power to adjudicate the vessel;

Cook v. United States, 288 U. S. 102;

Point 3, pp. 38-46, *supra.*

(2) The appellant was entitled to the same treatment as a subject of Great Britain under the most favored nation cause of said Treaty.

Point 4, pp. 47-49, *supra.*

POINT 10.

The Filing of the Answer Was Not a Waiver of the Objection That the Government Lacked Power to Make the Seizure and the Trial Court to Adjudicate It.

Appellant requested the trial court to find as a conclusion of law [R. p. 190] that the search and seizure of the vessel was in violation of said Convention [Con. Q, R. p. 205] and he refused, with an exception to appellant [R. p. 208] and instead made a conclusion of law that he had "jurisdiction over these proceedings" [Con. II, R. p. 319]. Appellant assigned that as error [Error 48, R. p. 341; Error 78, R. p. 347].

The objection that the seizure was unlawful is based upon the fact that the Government of the United States lacked power to seize the vessel and the trial court lacked power to adjudicate the vessel. That objection, says the court, is not *"lost by the entry of an answer to the merits"*.

Cook v. United States, 288 U. S. 102, 122.

That rule was applied in the Federal Courts to other classes of cases.

So. Pac. R. Co. v. Denton, 146 U. S. 202, 206;
Harkness v. Hyde, 98 U. S. 476, 479;
Foster, Milburn Co. v. Chinn, 202 Fed. 175, 177.

POINT 11.

Appellant's Motion for Judgment Should Have Been Granted Because the Libelant Did Not Prove a Cause of Action and the Refusal Was Error.

Appellant, at the close of the case, moved for judgment in his favor upon the ground, among others, that the undisputed facts showed that he is a subject of Japan and the sole owner of the vessel; that her nationality is deemed that of her owner; that she was incapable of traversing within one hour sailing distance from the place of seizure to the coast; that under said Convention and Treaty, she was immune from seizure [R. pp. 108-113], and that motion is deemed denied because of the entry of the decree of forfeiture. Appellant assigned that as error [Error 90, R. pp. 350-352].

The *test* of the applicability of a Convention and Treaty to a vessel is the nationality of her owner.

Point 5, p. 50, *supra.*

The Government lacked power to seize the vessel at the place where she was seized, and the trial court lacked power to adjudicate her.

Point 3, pp. 38-46, *supra.*

POINT 12.

The Trial Court Had No Power to Vacate the Decree Dismissing the Libel Because That Power Resides in This Court and the Refusal to Vacate That Order Was Error.

The trial court made findings of fact [R. pp. 162-166], conclusions of law [R. pp. 167-169], a final decree *dismissing* the libel, and directed the return of the vessel and cargo [R. pp. 170-172], and it was *recorded* on June 29, 1933 [R. p. 172]. Thereafter he made an order vacating said decree and findings [R. p. 176]. Subsequently, he made an order modifying said order [R. p. 177]. Thereafter, he granted appellant exceptions to the making of said orders [R. pp. 181-183]. Appellant requested the trial court to find [R. p. 190] that he made said orders [Finds. 31, 32, R. pp. 200-201], and he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 91, R. p. 352].

The application to vacate said final decree was in effect for a *new* trial, and the trial court had no *power* to grant such application.

The jurisdiction of admiralty courts depends upon the laws of Congress and decisions of the United States Supreme Court.

Ex parte Eston, 95 U. S. 68, 70;

Cope v. Vallette Dry-Dock Co., 10 Fed. 142, Aff'd in 119 U. S. 625.

The granting of a new trial in admiralty is unknown.

Greigg v. Reade, 10 Fed. Cas. No. 5, 804;
1 *C. J.* 1339. Note 65.

The reason for the rule stated is that an appeal to this court is a trial *de novo.*

Brooklyn Eastern Terminal v. United States, 287 U. S. 170, 176;

The San Rafael, 141 Fed. 270, 275;

Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 570;

The Mabel, 61 F. (2d) 537, 540;

The Cleary Bros. No. 61, 61 F. (2d) 393, 395.

"An appeal in admiralty has the effect to supersede and vacate the decree from which it is taken".

The Lucille, 86 U. S. (19 Wall.) 73, 74.

A new trial will not be granted in admiralty on the ground that a prior decision is inconsistent with that given.

Thomasser v. Whitwell, 23 Fed. Cas. No. 13,930;

The Frederick Der Grosse, 37 F. (2d) 355.

"State statutes relating to the granting of new trials are not applicable."

United States v. Mayers, 235 U. S. 55, 69;

Bronson v. Schulten, 104 U. S. 410, 417.

The statute *limits* the granting of a new trial in admiralty to cases *"where there has been a trial by jury."*

28 USCA §391.

"It applies to the Great Lakes and waters connected therewith, and then not to all issues of fact, but only to those arising in cases of contract or tort. *It cannot be availed of in cases of foreign vessels or of vessels trading between ports of the same state,* and introduces a system of trial wholly foreign to the practice, forms, and procedure of courts of admiralty."

The Western States, 159 Fed. 354, 356, cer. denied 210 U. S. 433;

28 USCA §770;

The Sarah, 21 U. S. (8 Wheat.) 391;

Whealen v. United States, 11 U. S. (7 Cranch.) 112;

The Betsy, 8 U. S. (4 Cranch.) 443;

United States v. La Vengeance, 3 U. S. (3 Dal.) 297, 301;

The Empire, 19 Fed. 558;

The Meteor, 17 Fed. Cas. No. 9,498;

Clark v. United States, 5 Fed. Cas. No. 2,837.

"Although the two jurisdictions are vested in the same tribunals, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended, than a court of chancery with a court of common law."

The Sarah, 21 U. S. (8 Wheat.) 391, 394.

POINT 13.

The Denial of the Motion to Set Aside the Orders Vacating the Decree Was Error.

Appellant moved to vacate the orders vacating the decree upon the ground, among others, that the trial court had no power to make said orders [R. pp. 183-184] and he reserved decision on that motion [R. pp. 187-189]. That motion is deemed denied because of the entry of the decree of forfeiture. Appellant assigned that as error [Error 91, R. p. 352].

The trial court had no power to vacate the decree dismissing the libel.

Point 12, pp. 62-64, *supra*.

POINT 14.

The Ex Parte Order of August 2, 1934, Should Have Been Vacated Because the Matters Set Forth for Hearing Were Not Issues in This Case and the Refusal Was Error.

The trial court on the settlement of the findings and decree, made an *ex parte* order setting the case down for hearing on the following matters: (1) that the Collector of Customs did not request the United States Attorney to institute this libel against the *cargo* but only the vessel; (2) that the Collector of Customs *destroyed* the cargo except 5 cases for use of evidence; (3) that the United States Marshal did not *attach* the cargo, but only the vessel, and (4) that appellant did not file a *claim* for the cargo with the Collector of Customs [R. pp. 209-210]. At the opening of that hearing, the trial court granted appellant an exception to that order [R. p. 211]. Thereupon, appellant moved to vacate that order upon the ground that the matters to take proof under that order were not *issues* raised in the pleadings [R. pp. 211-212]. The trial court denied that motion with an exception to appellant [R. p. 211]. Appellant assigned that as error [Error 93, R. p. 353].

A cursory perusal of the pleadings will show that the matters recited in the order to take proof are not issues raised by the pleadings [R. pp. 5-9, 15-21, 25-29].

The evidence that the Collector of Customs did not request the U. S. Attorney to institute this libel against the

cargo is in contradiction of the allegations of the original libel of information [R. pp. 5-9], and the amended libel of information [R. pp. 25-29], and was inadmissible.

Point 15, pp. 68-70, *infra.*

It was immaterial as to what request the Collector of Customs made. It was the duty of the U. S. Attorney to include the cargo in this proceeding.

Point 17, p. 72, *infra.*

The Collector of Customs had no *power* to destroy the cargo, but was in duty bound to retain it until it was adjudicated in this proceeding.

Point 40, pp. 115-117, *infra.*

If the Collector of Customs destroyed the cargo before adjudication, he did so at his peril, and the trial court had no power to take testimony for the purpose of prejudging that question, because that was not in issue in this proceeding.

The question whether or not appellant filed a claim was not an issue raised by the pleadings.

It was not necessary to file a claim with the special appearance on the motion to quash. That objection was not made before trial, and is deemed as waived. The trial court, and the libelant, treated appellant's answer as a claim and it was immaterial whether a formal claim was filed.

Point 23, pp. 80-82, *infra.*

POINT 15.

The Ex Parte Order Was a Travesty Upon Justice Because It Permitted Libelant to Contradict Its Libel of Information and Orders of the Court Which It Procured and the Refusal to Set It Aside Was Error.

Appellant moved to set aside the *ex parte* order permitting libelant to contradict its information upon the ground that the matters stated therein were not *issues* raised by the pleadings [R. p. 211], and that motion was denied with an exception to appellant [R. p. 212]. Appellant assigned that as error [Error 93, R. p. 353].

The *cargo* was included in the original libel of information [R. pp. 5-9], order for process to issue [R. pp. 10-11], monition [R. pp. 12-13], and amended libel of information [R. pp. 25-29]. The trial court by said *ex parte* order permitted the libelant to *contradict* them. This was a novel procedure in the history of jurisprudence of law, but the innovation is contrary to the well established principles of law.

> "In the first place parties are entitled to rely upon the pleadings."
>
> *The Russell*, U. S. 3, 7 Fed. Supp. 812-813.

The case of *The William Harris*, 29 Fed. Cas. No. 17,-695, is directly in point. The libel was for wages earned on a voyage. The libel alleged that the vessel was about to proceed to sea before the expiration of ten days from the discharge of the cargo and the answer did not deny that allegation. The court, per Ware, J., said:

> "* * * No evidence can properly be received to contradict it, because the proof must be confined to

the matters in issue. The court cannot travel out of the record to decide questions which the parties have not submitted to it, and nothing is submitted to its determination but what is distinctly alleged on one side and contradicted on the other. It is true that courts of admiralty are not restrained by strict technical rules of pleading which prevail at common law, but it is not less true in all courts, that the matter in controversy must be distinctly propounded, and each party must set forth by plain and precise allegations the grounds on which he asks for the judgment of the court in his favor, as well as to disclose to the adverse party the points to which he must direct his proof, as to enable the court to see what is in controversy between them. * * *"

The case of *The Mary C.,* 16 F. Cas. No. 9,201, is directly in point. In that case the court, per Fox, J., said:

" * * * After the case had been fully heard and the arguments closed, a motion was made by his proctor for leave to amend this averment in his answer by changing northwest to northwest by west. The amendment was not allowed; and on further reflection I am satisfied that the ruling was correct. The cause had been fully heard and argued to the court, with this in the answer as to the course of the wind; it was a deliberate, sworn statement by the master, of the fact as he understood it to have been when called upon to respond to the charges against him in the libel, and it is not the practice of any court, at such a stage of the cause, to permit a material amendment which will destroy the effect of an admission of so much importance, relative to a matter which had been a principal subject of controversy before the court for more than ten days * * *."

If the practice here inaugurated be indulged in with impunity, what will become of the doctrine of *secundum allegata et probata,* which was in existence before our Government? The judicial ermine did not clothe the trial court to do as he pleased. He can act only judicially, which means within the rules of law. He cannot travel outside of the record to decide questions not in issue, because he was asked *ex parte* by one of the parties to this litigation.

The maxim applies to prosecutions in courts of admiralty and is "essential to the due administration of justice in all courts".

The Hoppet, 11 U. S. (7 Cranch.) 389, 394.

A departure from the doctrine of *secundum allegata et probata* will create "inextricable confusion and uncertainty and mischief in the administration of justice".

Wright v. Delafield, 25 N. Y. 266, 270.

It is elementary that in an admiralty case, "the proof must conform to the allegations. Certain it is that the decree must be *secundum allegata et probata*".

The Reichert Line, 64 F. (2d) 13, 14.

That is the rule in the State Court.

Barrere v. Somps, 113 Cal. 97, 102.

"The very object and design of all pleadings" is that the party "may thus have an opportunity of meeting and defeating it". If the doctrine may be disregarded, "the parties might better be permitted to state their demands orally before the court at the time of trial, as is done in courts of justice of the peace".

Soden v. Murphy, 42 Colo. 352, 356.

POINT 16.

The Evidence Contradicting the Libel of Information Should Be Disregarded, Because It Was Received Over Appellant's Objection and Exception.

The appellant moved to set aside the *ex parte* order setting this proceeding down for further hearing with respect to matters stated therein, upon the ground that they are not issues tendered by the pleadings and that motion was denied with exception to appellant [R. pp. 211, 212]. Appellant assigned that as error [Error 95, R. p. 353].

The additional testimony taken under appellant's objection and exception should be disregarded.

> "A cardinal principle in admiralty proceedings is, that proofs cannot avail a party further than that they are in correspondence with the allegations of the pleadings."
>
> *The Rhode Island,* 20 Fed. Cas. No. 11,745, quoted with approval in *Second Pool Coal Co. v. People's Coat Co.,* 188 Fed. 892, 895;
>
> *The Hoppet v. United States,* 11 U. S. (7 Cranch.) 389;
>
> *Treadwell v. Joseph,* 24 Fed. Cas. No. 14,157;
>
> *Jenks v. Lewis,* 13 Fed. Cas. No. 7,280;
>
> *The Wm. Harris,* 29 Fed. Cas. No. 17,695;
>
> *Ward v. The Fashion,* 29 Fed. Cas. No. 17,155.

In the case of *Kenah v. The Tug John Markee, Jr.,* 3 Fed. 45, the answer to the libel admitted the contract and notwithstanding that, testimony was introduced to show different facts and impeaching that admission. The court per Butler, D. J., said at page 46:

> " * * * This will not, however, relieve the respondent from the effect of his admission and statement, *as evidence,* in passing upon the new issue raised * * * " (Italics ours).

POINT 17.

The Statute Required the U. S. Attorney to Being One Libel for the Cargo and Vessel and if He Brought Separate Libels the Court Was Directed to Consolidate Them. Therefore It Was Immaterial That Collector's Instructions Did Not Include the Cargo.

The trial court found as a fact that the Collector of Customs requested the U. S. Attorney to libel the vessel [Find. V, R. p. 313], and as a conclusion of law that the cargo did not come within "the jurisdiction of this court" [Con. I, R. p. 319]. Appellant assigned that as error [Errors 93, R. p. 353; 65, R. p. 344].

The officer is required to immediately report the seizure to the Collector of Customs.

> §602 *Tariff Act* 1930, 46 U. S. Stat., Part 1, p. 754, 19 USCA §1602.

The latter is required to report the seizure to the Solicitor of the Treasury and U. S. Attorney.

> §603 *Tariff Act* 1930, 46 U. S. Stat., Part 1, p. 754, 19 USCA, §1603.

The latter is required to determine whether the facts warrant to institute a libel.

> §604 *Tariff Act* 1930, 46 U. S. Stat., Part 1, p. 754, 19 USCA, §1604.

If he concludes to bring suit, he must bring *one* libel for the cargo and vessel and if he brings separate suits, the court is *directed* to consolidate them.

> *R. S.* §920, 28 USCA §733.

POINT 18.

The Libel Included the Cargo and Appellant Relying Thereon Gave Up Important Legal Rights and Over Two Years After That Libelant Denied the Propriety of Its Inclusion. That Was a Fraud Upon Appellant.

The original libel of information, order for process to issue, monition and amended libel of information was against the *cargo* and vessel [R. pp. 5-13, 25-29]. The proceeding was tried upon that theory, and the trial court treated the cargo as involved in this proceeding in the order dismissing the libel, the findings and decree entered thereon [R. pp. 161-172] which he later vacated [R. pp. 176-177]. The libelant, over *two* years after the filing of the original libel, then, for the *first* time, denied the propriety of the inclusion of the cargo and this upon false premises. The libelant claimed that the Collector requested the former U. S. Attorney to libel the vessel and made no mention of the cargo [R. pp. 225-226]. The present U. S. Attorney by innuendo contended that the former U. S. Attorney surreptitiously included the cargo [R. pp. 230-234]. It was the *duty* of the former U. S. Attorney to include the cargo in this libel, irregardless the Collector made no request (Point 17, p. 73, *supra.*)

The libelant lulled appellant into security that this proceeding involved the condemnation of the *cargo* and vessel. He subsequent changed scene, by claiming that this proceeding did not include the condemnation of the *cargo,* that amounted in legal effect to the absorption of legal rights by legal fraud.

The case of *People v. Schwartz,* 201 Cal. 309, is akin to the instant case. In that case, the defendant, upon the promise of immunity, made a clean breast of the offense committed, and subsequently, she was sentenced to imprisonment. She sought to withdraw the plea of guilty, which was refused, and the order upon appeal was reversed. The court, in an opinion per Preston, J., said at pages 313-314:

> " * * * The facts as alleged fully warrant the conclusion that substantial rights of defendant have been taken away from her without an opportunity for a hearing on the merits, and this by those persons charged with the enforcement of the law. While no personal blame may attach to anyone connected with the matter, yet, if said allegations be true, the failure of the court to adopt the covenants made by the district attorney and the grand jury with defendant amounted in legal effect to the absorption of her legal rights by at least legal fraud. * * * "

The case of *Boles v. City of Richmond,* 133 S. E. 593, is in point. The plaintiff served a notice of the accident and was informed that the City disclaimed liability, because of plaintiff's contributory negligence. The City, on the trial, claimed that the notice was insufficient. It was held that the City could not raise that objection. The court, per Holt, J., said at page 595:

> "* * * It would violate every principle of fair dealing for the City to say you may have had a case, but with a *red herring* we have distracted your attention from a fatal technical omission in your notice. We have lulled you to sleep, and now your day of grace has passed. * * *." (Italics ours.)

POINT 19.

The Trial Court Should Have Taken Judicial Notice of the Judgment in the Criminal Action Because It Impliedly Determined That the Vessel's Nationality Was Japanese and the Seizure Was Unlawful and the Refusal Was Error.

The appellant, in moving to set aside the orders which vacated the final decree dismissing the libel [R. p. 183] requested the trial court to take judicial notice of the judgment in the criminal action arising out of the seizure in this proceeding [R. p. 184], and he reserved decision thereon [R. pp. 188-189]. The appellant requested the trial court to find [R. p. 190] that he made such request [Find. 30, R. p. 200], and he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 28, R. pp. 336-37].

The settled rule in the Federal Courts is that it will take judicial notice of its own records.

In re Boardman, 169 U. S. 39, 44;

Craemer v. Washington, 168 U. S. 124, 128.

The rule stated applies to records of criminal actions.

United States v. Wright, 224 Fed. 285, 286;

Withaup v. United States, 127 Fed. 530, 536;

In re Bennett, 84 Fed. 324, 327.

That rule applies to a special plea sustained in a criminal action.

Robinson v. State, 21 Tex. A. 160, 162.

POINT 20.

The Judgment-roll in the Criminal Action Should Have Been Received in Evidence Because It Impliedly Adjudged That the Nationality of the Vessel Was Japanese and That Her Seizure Was in Violation of the Convention and Treaty and Its Exclusion Was Error.

The appellant, upon the hearing pursuant to the order of August 2, 1934 [R. pp. 209-210], offered in evidence the judgment-roll in said criminal action [R. p. 258]. The libelant objected upon the ground it "not having a proper foundation laid and immaterial to prove any of the issues in this action", and the trial court sustained that objection with an exception to appellant [R. p. 258]. The judgment-roll was marked for identification [R. p. 258], and a brief statement thereof is in the Apostles on Appeal [R. p. 259]. Appellant requested the trial court to find as a fact [R. p. 190] that said judgment was conclusive [Finds. 29, 30, R. pp. 199-200], and he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Errors 27, 28, R. pp. 336, 337].

The objection that appellant did not lay "a proper foundation" was frivolous. What foundation was necessary to lay? This court will take judicial notice that the initial next to the number of the case is the same as the trial judge who tried this case. The latter could have looked at the judgment-roll to identify its genuineness, and that it was a record of his court.

The objection that it was "immaterial to prove any of the issues in this case" is likewise frivolous, if not preposterous. A cursory reading of the judgment-roll will reveal that the questions of the nationality of the vessel, and the right to seize her, were necessarily involved therein. It is very obvious that the judgment-roll in said criminal action was material in this action for the reason that the trial court quashed the indictment and in doing so must have found as a fact that the nationality of the vessel was Japanese, and that her seizure on the high seas was in violation of said Convention and Treaty. To say, therefore, that the judgment-roll in the criminal action was immaterial is not talking common sense nor law.

The judgment-roll in the criminal action was not offered in evidence in bar of this proceeding, but merely as evidence of the fact in issue. As evidence of a fact in issue, it was competent although not pleaded like any other evidence, whether documentary or oral. As evidence, it was conclusive as an adjudication of the same fact, the same as any other species of documentary evidence.

Krekeler v. Ritter, 62 N. Y. 372, 374;
Higuera v. Corea, 168 Cal. 788, 789;
Stockton v. Knock, 73 Cal. 425, 426;
15 *Cal. Jur.* 208, §230, Notes 10-13;
34 *C. J.* 1066, §1507, Note 73.

POINT 21.

The Trial Court Should Have Excluded the Precept and Return in the Case No. 4024-C Because It Was Not Pleaded in the Libel of Information and Was Not Recited in the Order to Take Further Proof.

On the hearing, under the order of August 2, 1934 [R. p. 209], libelant offered in evidence the precept and Marshal's return in the case of *Garbutt-Walsh, Marine Hardware Company, et al. v. The Boat "Patricia", etc.,* "to show a break in the title" [R. p. 395]. Appellant objected to its introduction in evidence upon the ground that it was incompetent, irrelevant and immaterial, and not binding upon him [R. p. 290]. It will be recalled that the records produced by the Collector of Customs, Marine Department, did not show a break in the title, but showed that the vessel was owned by subjects of Japan continuously from the time she was built up to the time she was seized on the high seas.

The libelant did not plead said judgment nor said precept and return in the original libel of information [R. pp. 5-9] nor in the amended libel of information [R. pp. 25-29], nor was that recited in the order of August 2, 1934 [R. p. 209].

Minick testified that the vessel was sold to one Homer Pitner [R. p. 296], but, as stated above, the records of the Collector of Customs, Marine Department, did not show such sale, and it is fair to assume that Homer Pitner acted merely as agent for O. Uymato and K. Uyegi or George Kioo Agawa, the former owner of the vessel in question. Moreover, the libel of information does not allege the sale as a violation. Furthermore, the fact remains that appellant was the sole owner of the vessel when she was seized on the high seas, and there is no dispute that he is a subject of Japan.

POINT 22.

It Was Not Necesary to File a Claim for the Cargo With the Collector of Customs and the Finding That He Rightfully and Lawfully Disposed of It Is Against Law and Erroneous.

The trial court found as a fact that no claim for the cargo was filed with the Collector of Customs [Find. VI, R. pp. 313-314], and as a conclusion of law found that he rightfully and lawfully disposed of it [Con. I, R. p. 319]. Appellant assigned that as error [Errors 66, R. p. 345; 77, R. p. 347].

The *cargo* was included in the libel of informations for adjudication [R. pp. 5-9, 25-29]. The order directed that process issue against the *cargo* and vessel [R. pp. 10-11], and the monition included the *cargo* [R. pp. 12-13]. The Collector of Customs was the mere legal *custodian* of the cargo and required by statute to hold it to *"await disposition according to law"*, and he could not dispose of same until a *decree* was entered.

§§602, 605, 611, *Tariff Act* 1930, 46 U. S. Stat., Part I, pp. 754-755;

Point 40, pp. 115-117, *infra*.

It was therefore unnecessary to file a claim for the cargo with the Collector when as a matter of fact the cargo was being adjudicated in this proceeding.

POINT 23.

It Was Not Necessary to File a Claim on the Motion to Quash the Seizure. The Objection Was Not Raised Before Trial and Is Deemed Waived. Appellant Was Excused From Filing a Claim Because He Was Then Under Indictment. The Answer Was Treated as a Claim and Precluded Libelant From Raising the Question After Trial.

The trial court found as a fact that appellant did not file a claim for the cargo [Find. X, R. p. 318]. Appellant assigned that as error [Error 68, R. p. 345].

(1) The Apostles on Appeal show that appellant appeared *specially,* objected to the jurisdiction of the court and moved to quash the seizure [R. pp. 31-39].

It is not necessary to file a claim upon a *special* appearance.

> *E. J. Du Pont de Nemours & Co. v. Bentley,* 19 F. (2d) 354.

(2) The libelant raised the objection for the *first* time *ex parte* on the settlement of the findings and decree [R. p. 210]. The objection was made too late.

An objection that a claim was not filed must be made *before* trial, and if not made then it is deemed waived.

> *United States v. 422 Casks of Wine,* 26 U. S. (1 Peters) 547, 549;
>
> *White v. Cynthia,* 29 F. Cas. No. 17, 546a;
>
> *The Prindiville,* 19 F. Cas. No. 11,435;
>
> *Aumach v. The Queen of the South,* 2 F. Cas. No. 657a;
>
> *The Boston,* 3 F. Cas. No. 1,673;
>
> *Brown on Admiralty,* 485.

(3) The libelant, if he contests the right of claimant, may file exceptions and raise that point.

The John K. Gilkinson, 150 Fed. 454;

The Seminole, 42 Fed. 924, 925;

The Two Marys, 10 Fed. 919.

The libelant did not file exceptions that appellant did not file a claim and could not urge that on the settlement of the findings and decree.

(4) The trial court had no jurisdiction to adjudicate the cargo or vessel.

Point 3, pp. 38-46, *supra;*

Point 4, pp. 47-49, *supra.*

The rule providing for the filing of a claim was intended to apply to a case where the trial court has jurisdiction to make an adjudication and not in a case where he had none.

(5) Appellant was under indictment arising out of the seizure in this proceeding [R. p. 259]. That would have excused him from filing an answer.

U. S. Supr. Ct. Admiralty Rule 30.

That rule is broad enough to excuse the filing of a "claim".

(6) The Apostles on Appeal show that appellant filed a stipulation for costs [R. pp. 23-24], and he thereby acquired the status of a party in this proceeding.

Briggs v. Taylor, 84 Fed. 681, 683.

(7) The libelant recognized appellant as the claimant of the cargo and vessel [R. pp. 41, 172, 208, 321, 324]. The trial court did likewise [R. pp. 161, 178, 208, 210, 310]. The preamble of the findings recites that the trial court heard the cause upon appellant's *"claim and answer"* [R. p. 311]. The body of the findings refers to appellant as the *"claimant"* [Finds. XII, R. p. 315; XIII, R. p. 315; XIV, R. pp. 315-316; XXVII, R. p. 316]. The body of the decree also refers to appellant in several places as the *"claimant herein"* [R. pp. 323-324]. The libelant was thereby estopped from raising the question.

(8) Appellant testified that he was the owner of the vessel seized [R. pp. 51, 283], and the trial court found that as a fact [Find. XII, R. p. 315]. On the hearing *after* the trial, the trial court questioned appellant at great length regarding the cargo [R. pp. 265-273], and elicited from him that it was placed on board of his vessel on the high seas from a vessel in distress [R. pp. 220-272]. That evidence established the claim for the vessel and cargo.

(9) The object of filing of a claim is merely to give the claimant *persona standi in judicio,* the standing of a party in this proceeding.

United States v. 422 Casks of Wine, 26 U. S. (1 Peters) 547, 549.

(10) The claim is nothing but a statement of the party's right in the property, and its sole purpose is to show his right to oppose the libel.

The Two Marys, 12 Fed. 152, 154.

POINT 24.

The Finding That the Cargo Did Not Come Within the Jurisdiction of the Trial Court in This Proceeding Is Against Law and Erroneous.

The trial court found as a fact that the vessel was *loaded* with cargo and was seized on the high seas by an officer of the Coast Guard at a place within the jurisdiction of the court [Find. I, R. pp. 311-312]; that she was towed to the Coast Guard Base [Find. II, R. p. 312]; that while there, the Collector of Customs adopted said seizure [Find. III, R. p. 312], and as a conclusion of law found that the cargo did not come "within the jurisdiction of this court" [Con. I, R. p. 319]. Appellant assigned that as error [Error 77, R. p. 347].

The conclusion of law that the cargo did not come within the jurisdiction of the court, presumably, is based upon the finding of fact made that the U. S. Marshal did not "arrest or attach the cargo" [Find. VIII, R. p. 314]. Assuming that was so, that did not justify the trial court to make said conclusion of law.

The Assistant Collector, Salter, *admitted* in the trial court that after the Collector of Customs adopted said seizure, *he* removed the cargo from the vessel and placed it in a warehouse for safe keeping [R. pp. 236, 237]. Thereafter this proceeding was instituted [R. pp. 9, 241] against the *cargo* and vessel [R. pp. 5-13, 25-29].

Section 605 of the *Tariff Act* of 1930, 46 U. S. Stat., Part 1, page 754, provides that when a vessel or merchandise is seized, it *"shall be placed and remain"* in the custody of the Collector of the district in which the seizure was made to *"await disposition according to law"*.

Section 934 of the *Revised Statutes*, 28 USCA §747, reads as follows, to-wit:

> *"All* property *taken* or *detained* by *any* officer of other person, under authority of any revenue law of

the United States, shall be irrepleviable, *and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.*" (Italics ours.)

The section quoted in the context "refers to the period before libel filed and arrest, since the goods would be *in custodia legis after that in any event*".

Standard Carpet Co. v. Bowers, 284 Fed. 284.

The section last cited applies to a vessel.

Lima v. Bidwell, 182 U. S. 1, 179, 180.

A seizure made by a prohibition agent.

In re Behrens, 39 F. (2d) 561, 563.

A seizure of intoxicating liquors.

Rothman v. Campbell, 54 F. (2d) 103, 106.

Seizure of an automobile.

United States v. Gowen, 40 F. (2d) 593, 598.

And in an admiralty proceeding.

The Whippoorwill, 52 F. (2d) 985, 989.

"The jurisdiction of the court was secured by the fact that the *res* was in the possession of the prohibition director when the libel was filed."

Dodge v. United States, 272 U. S. 530, 532.

The rule in admiralty is that in a libel proceeding *in rem* "it is necessary that the thing should be actually or *constructively* within the reach of the court. It is actually within its possession when it is submitted to the process of the court; *it is constructively so, when, by a seizure, it is held to ascertain*" by a judicial decree.

The Brig Ann, 13 U. S. (9 Cranch.) 289, 291*;
The Fideliter, 1 Abb. U. S. Report 577.

The rule last referred to and the cases last cited were under the old statute, but under R. S. §934, 28 USCA §747, when property is taken or detained by an officer under the revenue law, it is deemed in *actual* custody of the law, which means the court, and subject, "*only to the orders and decrees of the courts*".

In the instant case, the trial court acquired jurisdiction over the *cargo* by the fact that it was seized by an officer of the Coast Guard and then taken into actual possession by the Collector of Customs who was by statute designated as its legal *custodian* for the court pending its adjudication. When the Collector of Customs, he took possession of the cargo, it was, in contemplation of law, in the custody of the court; and he remained as much responsible to the court for the cargo, and as much bound to obey its decrees and orders, "*as the marshal is, as to property confided to his care. The collector is in fact quoad hoc the mere official keeper for the court.* See *Smart v. Wolff*, 3 Term R. 323."

Burke v. Trevitt, 4 Fed. Cas. No. 2,163.

The jurisdiction which the trial court acquired over the cargo was for a *limited* purpose, to the extent only to adjudicate that the seizure was unlawful.

Cook v. United States, 288 U. S. 102.

The conclusion of law made by the trial court that the cargo "did not come within the jurisdiction of this court" [Con. I, R. p. 319] is contrary to §605 Tariff Act of 1930, 46 U. S. Stat., Part 1, page 754, and R. S. §934, 28 USCA §747, and is therefore erroneous.

POINT 25.

The Finding That the Cargo Did Not Come Within the Jurisdiction of the Trial Court Is Inconsistent With the Finding That He Had Jurisdiction of This Proceeding and Is Erroneous.

The trial court found as a conclusion of law that the cargo did not come within his jurisdiction in this proceeding [Con. I, R. p. 319], and that he had jurisdiction of this proceeding [Con. II, R. p. 319]. Appellant assigned that as error [Errors 77, 78, R. p. 347].

These conclusions are inconsistent. If he had jurisdiction of this proceeding it necessarily follows that the cargo came within his jurisdiction. The libel is against the cargo and vessel [R. pp. 5-13, 25-29]. It is immaterial that Dwight made separate reports [R. pp. 214-216, 219-222]. It is undisputed that there was but *one* seizure on the high seas, namely, the vessel and the cargo on board at the time. *"The seizure and the taking into port necessarily include the cargo and persons on board."*

Ford v. United States, 273 U. S. 593, 610.

POINT 26.

The Finding That the Vessel Was Not Entitled to Fly the Japanese Flag Is Without a Scintilla of Evidence to Support It and Is Against Law and the Assignment of Error to That Finding Presents Error.

The trial court found as a fact that the vessel "was not entitled to fly the Japanese flag" [Find. XVI, R. p. 316]. The appellant assigned that as error [Error 71, R. p. 345].

There is not a *scintilla* of evidence in the Apostles on Appeal proving or tending to prove that the vessel was not entitled to fly the Japanese flag.

The only evidence on that branch of the case is the testimony of Kakichi Asawa, libelant's witness. He testified that he was the Vice Consul of Japan [R. p. 126]; that he did not study the laws of Japan with reference of registering, licensing or documenting of vessels [R. p. 126] and that he did not know the laws of Japan with reference thereto [R. pp. 126-127]. He produced a book which he said contained the laws concerning Japanese boats written in Japanese language [R. p. 127]. He produced another book which he said contained registered ships in Japan [R. p. 130]. The book of laws stated that ships must be registered and their names cannot be changed [R. pp. 129-130]. He said that he made no special study concerning that matter [R. p. 148]. He said that *"other rules of our Government must make protec-*

tion of the Japanese subject and the Japanese vessel when they are out of the country" [R. p. 148]. It is very obvious that the evidence does not support the finding of fact that the vessel in question was not entitled to fly the Japanese flag.

It is significant to note that the U. S. Attorney, the proctor for libelant called the trial court's attention to the *"exchange of notes"* attached to said Convention [R. p. 155]. The material part thereof reads as follows (46 U. S. Stat., Part 2, p. 2449), to-wit:

> "I. That the term 'private vessels' as used in the Convention signifies *all* classes of vessels other than those owned or controlled by the Japanese Government and used for Governmental purposes, for the *conduct of which the Japanese Government assumes full responsibility.* * * *" (Italics ours.)

It has long ago been definitely settled that "exchange of notes" ratified *"is a part of the treaty and is binding and obligatory as if it were inserted in the body of the instrument".*

Doe v. Braden, 57 U. S. (16 How.) 635, 656.

The matter quoted in the context indicates that the Japanese Government expressly extended its sovereign protection to the vessel in question, and appellant thereunder was entitled to fly the Japanese flag.

POINT 27.

The Finding That Appellant Was Not Entitled to Fly the Japanese Flag Was Based on Judicial Knowledge Because That Was Not Pleaded or Proved and That Was Error.

The trial court found as a fact that the vessel "was not entitled to fly the Japanese flag, and did not have a national certificate, nor provisional national certificate, of the Japanese Government" [Find. XVI, R. p. 316]. Appellant assigned that as error [Error 71, R. pp. 345-346].

That finding presumably is based upon the laws of *Japan.* The libelant did not plead nor did he introduce in evidence the laws of Japan.

The rule is well established in courts of admiralty that it will *not* take judicial notice of a law of a foreign country unless it is pleaded and proved.

Liverpool Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 445;

Coghlan v. So. Carolina R'd Co., 142 U. S. 101, 114;

Dainese v. Hale, 91 U. S. 13, 20;

Talbot v. Seeman, 5 U. S. (1 Cranch.) 1, 38;

Panama Elec. R. Co. v. Moyers, 249 Fed. 19, 20.

That is the prevailing rule in Federal Courts, applicable to other class of cases.

The Hanna Nielson, 25 F. (2d) 984, 987;

The City of Atlanta, 17 F. (2d) 308, 311;

The Vedas, 17 F. (2d) 121, 122.

The underlying reason for the rule stated is that "it is a question of fact to be alleged and proved".

The Hanna Nielson, 25 F. (2d) 984, 987.

The rule stated applies with equal force to a case where the trial court is familiar with the jurisprudence of a foreign country. That, as a matter of law, does not authorize him to take judicial notice of the laws of that country.

The case of *Panama Elec. Ry. Co. v. Moyers,* 249 Fed. 19, is directly in point. In that case the court per Batts, J., said at page 21:

> "It is sought to excuse introduction of evidence of the law of Panama on the ground of familiarity of the trial judge with the jurisprudence of that country. Familiarity of the trial judge with the facts of the case being tried before him does not render unnecessary the introduction of evidence. It is quite possible that the trial judge could have qualified as an expert in the laws of Panama; his testimony with reference thereto would, in that event, have been admissible, but he was not called upon to testify."

POINT 28.

The Trial Court Decided This Case Upon the Doctrine Lex Loci Whereas It Is Governed by the Doctrine Lex Fori and That Was Error.

The trial court found that appellant "was not entitled to fly the Japanese flag", and that he did not have a national or a provisional national certificate of the Japanese Government [Find. XVI, R. p. 316]. Appellant assigned that as error [Errors 71, R. pp. 345-346].

The said finding impliedly found that the laws of Japan required appellant to procure a national or a provisional national certificate before he could fly the Japanese flag.

The rule is settled that in a suit relating to a transaction on the high seas, a court of admiralty will administer justice according to the law of the United States, unless a foreign law is pleaded and proved.

The Scotland, 105 U. S. 24, 29.

The libel of information did not plead the laws of Japan [R. pp. 5-9, 25-29], nor was it proved at the trial.

The law of the forum governs all matters of procedure relating thereto.

Willard v. Wood, 164 U. S. 502, 518;
1 *C. J.* 984, §92, Note 18.

It is elementary that the action is regulated *"solely and exclusively by the law of the place where the action is instituted".*

Dulin v. McCaw, 39 W. Va. 721, 731.

The *lex fori* governs "the admissibility of evidence".

Thomas v. Western Union Tel. Co., 25 Tex. Civ. A. 398, 400.

"By the law of this court, *the lex fori,* the competency of evidence in a proceeding before it, must be determined", and not that of foreign country.

The City of Carlisle, 39 Fed. 807, 816.

"The party who brings a suit is master to decide what law he will rely upon."

The Fair v. Kohler Die etc., Co., 228 U. S. 22, 25.

In the case at bar, the libelant presumably decided to rely upon the laws of the United States because he did not plead the laws of Japan.

Moreover, the said Convention provides that when a private vessel is seized on the high seas, it must be taken into a port of the United States for *"adjudication in accordance with such laws"*.

46 *U. S. Stat.* 2446-2449.

POINT 29.

The Finding That the Vessel Did Not Fly a Flag Did Not Affect Appellant's Right to the Benefits of the Treaty and Convention and the Refusal to Find That the Nationality of the Vessel Was That of Her Owner and Not of the Flag She Flies Was Error.

The trial court found as a fact that the vessel did not fly the Japanese flag [Find. XVI, R. p. 316]. Appellant requested the trial court to find [R. p. 190] as a conclusion of law that the flying of a flag is merely "notice" of her nationality and not "evidence of that fact" [Con. R, R. p. 205], and that the failure to fly a flag "did not justify her said seizure" [Con. S, R. p. 205] which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Errors 71, R. p. 345; 49, R. p. 341; 50, R. p. 341].

The flag is the superficial evidence of nationality of a vessel.

The Rothersand (1914), P. 251.

> "A flag is emblematic of the sovereignty of the power which adopts it."

Ruhstrat v. People, 185 Ill. 133, 145.

The flying of a flag is merely notice to which nationality the vessel belongs.

United States v. Brune, 24 Fed. Cas. No. 14,677.

A flag on a mast is merely notice that the master intends that the law of the flag regulate contracts.

Ruhstrat v. People, 185 Ill. 133, 144.

The "flag" of a vessel and its "ownership" may be proved by *parol* evidence or by any other competent evidence.

United States v. Holmes, 18 U. S. (5 Wheat.) 412;
United States v. Inbert, 26 Fed. Cas. No. 15,438;
United States v. Seagrist, 27 Fed. Cas. No. 16,245;
Regina v. Bjornsen, 10 Cox C. C. (Eng.) 74.

The flag is not conclusive of the vessel's nationality.

The Hamborn (1919), A. C. 993;
The Proton (1918), A. C. 578.

The case of *Chartered Mercantile Bank v. Netherlands India Steam Nav. Co.,* 10 Q. B. D. 521, was an action brought for loss of goods through a collision between the vessel of Willem Croon-Prins der Nederlander and the Atjeh. Both ships were registered in Holland and carried the Dutch flag. Both ships belonged to English companies. The question before the court was whether or not the flying of the Dutch flag under these circumstances made them Dutch ships. The court in an opinion per Brett, *L. J.,* said at page 535:

> "* * * The question is, whether the mere fact of obtaining a register in Holland and carrying the Dutch flag makes her a Dutch ship. It is absurd to suppose that the mere fact of carrying the Dutch flag makes her a Dutch ship. Pirates carried the flag of every nation, but they were hanged by every nation notwithstanding. To carry false papers was an ordinary mode of evading the laws of war, but nobody ever supposed that the mere fact of carrying a foreign neutral flag and having papers of a foreign

neutral country would cause the ship to be considered as the ship of the nation whose flag and papers she carried. * * *."

The case of *The Tommi* (1914), P. 251, was a seizure of the vessel "The Tommi". Her owner was the Norddeutsche Kraftfutter Gesellschaft, a German company. She left Danzig, laden with molasses, consigned to an English company. While she was in transit, her owner sold her to the Sugar Fodder Company, Limited, an English company. She arrived at Gravesend on August 5, 1914. On August 4, 1914, England declared war on Germany. The collector of customs at Gravesend seized her as a prize of war. The Sugar Fodder Company, Limited, claimed her as owner. One of the questions involved was, who was her owner? The High Court of Justice, Probate, Divorce and Admiralty Division, speaking through Sir Samuel Evans, president, said at page 256:

"* * * It does not matter whether the flag was actually flying, whether it was hoisted, or whether it was at the mast when the ship was captured; the question is what flag she was entitled to fly, and in my view there is no distinction on this part of the case between the case of a ship captured at sea and the case of a ship seized in port. * * *."

The case of *Regina v. Bjornsen,* 10 Cox C. C. (Eng.) 74, Leigh & Cave's Crown Cases (1865), 545, is also in point. In that case the defendant was indicted for murder committed on board of the barque "Gustav Adolph" on the high seas at a point about 25 days' sailing from Pernambuco and about 200 miles nearest to land. The

question involved was whether the barque was a British ship. She was built in Kiel Duchy of Holstein in 1864. She was sailing under the *English* flag on June 21, 1864. The crew was told before sailing that Mr. Rehder was the sole owner. A certified copy of the register of the barque was put in evidence. Documentary evidence was introduced showing that Paul Ellers was in partnership with Mr. Rehder in that vessel, and that Mr. Ellers was not a British citizen. The jury acquitted the defendant of murder and found him guilty of manslaughter. The trial judged reserved three questions for determination which were thereafter heard by the entire members of the court, and they quashed the conviction. Each of the judges wrote a separate opinion.

Erle, *C. J.*, said:

> "I am of opinion that this conviction cannot be sustained. The question in this case is, whether there is jurisdiction to try in England a man who has committed a crime of manslaughter thousands of miles away from British territory; and the principle relied on is that the ship is British, and so was in the nature of British territory. The whole case turns on whether the ship was British or not. There is *prima facie* evidence that it was British for the statement in the register that the owner resided in London and the fact that the ship sailed under the British flag amount to that. It has been proved, however, that the owner is an alien; and the question comes to this—whether the presumption arising from the

flag and the residence of the owner is rebutted by proof that the owner is not a natural-born British subject, or whether the effect of that proof is met by the presumption that the owner has not violated the laws of this country by having falsely represented himself to be qualified to own a British ship. I am of opinion that the presumption arising from the residence of the owner is rebutted by the proof that that owner was not a natural-born British subject, and that I cannot draw the reference that he has been naturalized or has received likewise of denization. My judgment is limited to the question of evidence, and does not involve any question of general or international interest."

Blackburn, *J.*, said:

"* * * The point, therefore, is this—was the ship British or not? I agree that its sailing under the British flag, coupled with the fact that the owner resided in London, amounted to *prima facie* evidence that the ship was British. Here, however, there is proof that the owner was an alien; and the mere fact that an alien is resident in London does not make him a British subject. Such a person merely owes a temporary allegiance to the British Crown (The Alien Chief (A)) so long as he remains in this country; and it would be absurd to say that the temporary residence of an alien in this country made his ship a part of the British territory. * * *."

POINT 30.

The Finding That the Vessel Was Not Registered in Japan Did Not Affect Her Nationality Because Her Nationality Is Nevertheless That of Her Owner, and the Refusal to Find That Was Error.

The trial court found that the vessel was not entitled to fly the Japanese flag [Find. XVI, R. p. 316]. The appellant requested the trial court to find [R. p. 190] as a conclusion of law that the nationality of the owner of the vessel and not the flying of the flag determines her nationality [Con. T, R. p. 205] which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 71, R. pp. 345-346; Error 51, R. p. 342].

The rule in this country is well settled that the nationality of a vessel not registered with the government is that of her owner.

In the case of *The Chiquita,* 19 F. (2d) 417, the vessel "Louis Pol" was built in Scranton, Mississippi. Subsequently her name was legally changed to "Patsy", under which she was granted a license to engage in coastwise trade. Thereafter the license was surrendered at Miami, Florida, and she departed for Nassau. She was there seized to enforce a maritime lien and was under a judgment sold and purchased by a British subject. Thereafter her name was changed to "Aesop" and given British registry. Thereafter she was seized off the coast of Mississippi, libeled as British vessel with violation of the

customs laws and subsequently released in that proceeding. Thereafter she underwent repairs at Mobile, Alabama. Subsequently she was sold to Carlos Armador, a citizen of Honduras. Her name was changed to "Chiquita". She was seized about 35 miles off the Louisiana coast. A libel of information was filed alleging her to be an American vessel, and seeking her forfeiture and that of her cargo. The trial court rendered judgment decreeing forfeiture (18 F. (2d) 673) and the judgment was upon appeal reversed. The court per Foster, *J.*, said at page 418:

> "* * * It is immaterial that the Chiquita may have lost her British registry, and has not yet acquired permanent Honduran registry. * * * If she is not properly registered, her nationality is still that of her owner. Moore, International Law, Vol. 2, pp. 1002-1009. * * *."

See, also:

58 *C. J.* 30, Note 4.

The rule in England is well settled that the nationality of a vessel not duly registered with the government is that of her owner.

> *Chartered Mercantile Bank v. Netherlands India Steam Nav. Co.*, 10 Q. B. D. 520, above quoted;
>
> 58 *C. J.* 30, Note. 4.

POINT 31.

The Finding That Appellant Was "Domiciled" in the United States Is Without a Scintilla of Evidence to Support It and Is Against the Undisputed Evidence and Is Contrary to Law.

The trial court found as a fact that appellant "was domiciled in the United States" [Find. XIII, R. p. 315]. Appellant requested him to find [R. p. 190] that his domicile was "in the City of Nishinomiya in the Province of Hyogo, Japan", and that he was sojourning temporarirly in the United States [Find. XXII, R. pp. 196-197], which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Errors 69, R. p. 345; 20, R. p. 333].

There is not a scintilla of evidence proving or tending to prove that appellant "was domiciled in the United States". The evidence bearing on that branch of the case is that appellant is married and lives with his wife and child at "No. 90 Ikadcho Street" in said city and Province of Japan; that he entered this country "May 13, 1929" under "a passport" [R. p. 263] and he is staying at "241-A Albicore Street" [R. p. 264], that his "permanent" home is in Japan, and is "temporarily" living at San Pedro [R. p. 264]. There is not another iota of evidence in the Apostles on Appeal, and we challenge the libelant to contradict this statement.

The trial court, at the trial, ruled "what is or is not a domicile, under this proceeding becames a question of *law*" [R. p. 263]. But the trial court made instead a finding of *fact* that appellant "was domiciled in the United States" [Find. XIII, R. p. 315]. That finding is clearly erroneous.

The passport was merely permission to enter and did not affect his status as an alien in the United States.

The status of such alien does not change by a long residence.

Ex parte Crawford, 165 Fed. 830;
Ehrlich v. Weber, 114 Tenn. 711.

The domicile of a married man is presumed to be at the place where his wife or family resides.

Gaddie v. Mann, 147 Fed. 955, 956;
Catlin v. Gladding, 5 Fed. Cas. No. 2,520;
The Thomas Fletcher, 24 Fed. 375, 378;
Hylton v. Brown, 12 Fed. Cas. No. 6,981.

A person may have several homes, only one of which can be his legal domicile.

Boyd's Exer. v. Commonwealth, 149 Ky. 764, 766;
The Thomas Fletcher, 24 Fed. 375, 378.

In order to constitute a domicile there must be present the *animus manendi* to remain permanently.

Matter of Roberts, 8 Paige Ch. (N. Y.) 519.

A man does not lose his domicile because he is engaged in business in another country.

State v. Schnyder, 182 Mo. 462, 518.

A subject of the Empire of Japan cannot acquire a domicile in the United States because he cannot enter this country except under certain conditions.

A Japanese born in Japan whose parents were Japanese is ineligible to become a citizen by naturalization.

8 *USCA*, §359.
Morris v. California, 291 U. S. 82, 85.

POINT 32.

The Finding That Appellant Was "Domiciled" in the United States Did Not Affect His Nationality.

Appellant requested the trial court to find as a fact that [R. p. 190] his domicile was in Japan, and that he temporarily resided in the United States [Find. 22, R. pp. 196-197] which he refused with an exception to appellant [R. p. 208]. The trial court instead found that appellant "maintained a home and was domiciled in the United States" [Find. XIII, R. p. 315]. Appellant assigned that as error [Errors 20, R. p. 333; 69, R. p. 345].

A change of domicile merely, does not "effect a change of allegiance".

State v. Jackson, 79 Vt. 504, 516.

The mere protracted residence abroad does not effect denaturalization.

In re Lee, 1 Extraterr. Cas. 699.

The nationality of an alien does not change by a long residence in the United States.

Santovincenzo v. Egan, 284 U. S. 30, 39;
Ex parte Crawford, 165 Fed. 830;
Ehrlich v. Weber, 114 Tenn. 711, 717.

POINT 33.

Libelant Was Estopped From Disputing the Nationality of the Vessel Because the Collector of Customs Entered Her as a Foreign Vessel and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that the Collector of Customs entered the vessel in his records as an alien Japanese vessel [Finds. 2, 3, 4, R. pp. 191-192], and as a conclusion of law that said entry precluded the libelant from disputing her nationality [Con. E, R. p. 202] which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Errors 2-4, R. pp. 328-329; 36, R. p. 339].

The *undisputed* evidence is that the Collector of Customs, Marine Department, entered the vessel as a Japanese alien vessel [R. pp. 141, 142, 143]. The trial court held that that evidence was *"persuasive"* [R. p. 151]. He found that as a fact in his order dismissing the libel [R. p. 161]. He made the same finding in the findings of fact [Find. 13, R. p. 165] and found as a conclusion of law that the libelant thereby well knew that she was an alien owned vessel [Con. B, R. p. 167] on which the decree was recorded and which he subsequently vacated [R. pp. 176-177]. And, yet, the trial court refused to make substantially the same finding, although the evidence on that issue was undisputed.

The refusal to find said facts and conclusions of law did not change the legal effect of the undisputed evidence.

The rule is settled that the Federal Government may be estopped by the acts or conduct of its officers and agents.

Walker v. United States, 139 Fed. 409, 413, Aff'd. 148 Fed. 1022;

United States v. Stinson, 125 Fed. 907, Aff'd. 197 U. S. 200;

United States v. Willamette Valley etc., 54 Fed. 807, 811;

State v. Milk, 11 Fed. 389, 397.

POINT 34.

Libelant Was Estopped From Disputing the Nationality of the Vessel Because the Collector of Customs Demanded and Collected Light Money From the Vessel, and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact that [R. p. 190] the Collector of Customs demanded and received light money from the vessel from the date she was built to the date of seizure [Find. 7, R. pp. 190, 193], and as a conclusion of law that that precluded the libelant from disputing the fact that her nationality is Japanese [Con. F, R. pp. 202-203] which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Errors 7, R. pp. 329-330; 37, R. p. 339].

The *undisputed* evidence is that the Collector of Customs collected "light money" from the vessel from July 12, 1924, to March 1, 1933 [R. p. 143]. The trial court held that that evidence was "*persuasive*" [R. p. 151]. In his order dismissing the libel, he found as a fact that "said

vessel was subjected to and required to pay 'light' taxes at all times since its construction" [R. p. 161], and made the same as a finding of fact [Find. XIII, R. 6. 165], and as a conclusion of law found that the libelant well knew that the said vessel was an alien-owned vessel [Con. B, R. p. 167] on which the decree was recorded and which he subsequently vacated [R. pp. 176-177], and, yet, the trial court refused to make substantially the same findings although the evidence on that issue was undisputed.

It is well settled that the Federal Government may be estopped by the acts or conduct of its officers and agents.

Point 33, p. 103, *supra.*

POINT 35.

Libelant Was Estopped From Disputing the Nationality of the Vessel Because of the Judgment in the Criminal Action and the Refusal to Find That Was Error.

Apellant requested the trial court to find [R. p. 190] that the criminal action terminated in a judgment in his favor [Find. 29, R. pp. 199-200], and as a conclusion of law that that judgment precluded libelant from disputing the nationality of the vessel as being a Japanese vessel [Con. X, R. p. 206], which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 27, R. pp. 335-336; Error 55, R. p. 342].

The *undisputed* evidence is that appellant and his crew were indicted for alleged offenses arising out of the seizure involved in this libel. They appeared *specially* and

moved to quash said indictment upon the ground their arrests were in violation of the said Convention, and that motion was denied. Thereafter, appellant moved for a rehearing of said motion based on the order dismissing the libel, the evidence taken on the motion to quash the libel in *this* proceeding, and that motion was granted and a judgment entered dismissing said criminal action [R. p. 259].

The main issues in the criminal action were whether or not the vessel (1) was a Japanese vessel and (2) the seizure was in violation of the said Treaty and Convention. The trial court must have found said issues against the libelant as otherwise he would not have quashed said indictment.

The rule in the Federal Courts is that where the *same* issue is involved in a criminal action, it cannot be again litigated "as the basis of any statutory punishment denounced as a consequence of the existence of the facts".

Coffey v. United States, 116 U. S. 436, 444;

Sierra v. United States, 233 Fed. 37, 41;

United States v. Rosenthal, 174 Fed. 652;

United States v. A Lot of Precious Stones and Jewelry, 134 Fed. 61, 63.

That rule also applies where the decision was rendered in a case which was begun by motion.

Am. Surety Co. v. Baldwin, 287 U. S. 156, 166.

POINT 36.

The Presence of the Vessel Within 12 Miles From Coast Did Not Justify Her Seizure Because It Was Not a Violation to There Take Bearings in a Fog and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that she was at the place of seizure for the purpose of taking bearings in order that her master ascertain his whereabouts [Find. 18, R. p. 196] and as a conclusion of law that neither violated any law or statute [Con. Y, Z, AA, BB, R. pp. 206-207] which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 16, R. p. 332; Errors 56-59, R. pp. 342-343].

The *undisputed* facts are that appellant pleaded as an affirmative defense that he was at the place of seizure to take bearings, and did not intend to go to the United States [R. pp. 20-21]. He testified that there was a *fog* on the high seas and he went to that place to ascertain his whereabouts [R. pp. 41-42] which was 19 miles from the coast [R. p. 44] and did not intend to land the cargo [R. pp. 271, 279, 282]. He was corroborated by the Government's witnesses who *admitted* that at that time there was a *fog* there and "visibility was very poor" [R. pp. 77, 82, 86, 87, 88, 89] so that a sextant could not be used [R. p. 82], and the top of Catalina Island could not be seen [R. p. 89]. The trial court, in commenting on appellant's evidence said, *"that the defendant owner*

of the boat did not know where his boat was" [R. p. 100] which was appellant's contention.

It was not a violation of law for a vessel to enter a port due to stress of weather or other necessity.

§586, *Tariff Act* 1930, 46 U. S. Stat., Part I, p. 749, 19 USCA, §1586;

The Louise F., 13 F. (2d) 548;

The Mary, 16 Fed. Cas. No. 9,183;

The Cargo Lady Essex, 39 F. 765, 767;

Peisch v. Ware, 8 U. S. (4 Cranch.) 347, 361, 363;

United States v. 1,197 Sacks of Intoxicating Liquor, 47 F. (2d) 284, 285.

POINT 37.

The Possession of the Cargo Within 12 Miles From the Coast Did Not Justify the Seizure Because It Was Not Engaging in Trade, Having Transferred the Cargo From a Vessel in Distress on the High Seas and the Refusal to Find That Was Error.

The trial court found as a fact that the "vessel was engaged in trade" [Find. XXI, R. p. 318]. Appellant requested the trial court to find [R. p. 190] as a conclusion of law that neither he nor his vessel violated the statutes or laws [Con. Y, Z, AA, BB, R. pp. 206-207], which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 76, R. p. 347; Errors 56-59, R. pp. 342-343].

The cargo was transferred on the high seas from a vessel in distress.

Point 36, pp. 107-108, *supra.*

The possession of transferred cargo on the high seas from a vessel in distress did not constitute a violation of the statutes.

United States v. 1,197 Sacks etc., 47 F. (2d) 284, 285;

The Pilot, 36 F. (2d) 250.

The only evidence that the vessel was engaged in "trade" is that the cargo was found on board at the time of the seizure. That was not sufficient to prove that the vessel was "engaged in trade" within the meaning of the statute.

The phrase "engaged in trade" implies more than *one* act, and the rule is settled that one *act* does not constitute "engaged in trade" as a matter of law.

The Chiquita, 44 F. (2d) 302, 304;

The Pilot, 36 F. (2d) 250, 252;

The Swallow, 23 Fed. Cas. No. 13,666;

The Willie G., 30 Fed. Cas. No. 17,762;

Morningstar v. State, 135 Ala. 66, 67;

Grant v. State, 73 Ala. 13, 14;

Nelson v. Johnson, 38 Minn. 255, 257.

POINT 38.

The Failure to Produce a Manifest Was Not a Violation Because Demand Was Made Beyond Government's Jurisdiction and the Vessel Was Not Bound to the United States and the Refusal to Find That Was Error.

The trial court found as a fact that the failure to produce a manifest for the cargo was a violation [Find. XX, R. p. 318]. Appellant requested the trial court to find as a conclusion of law [R. p. 190] that the vessel did not violate any statute or law that would subject her to penalty [Cons. Y, Z, AA, BB, R. pp. 206-207], and he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 75, R. p. 347; Errors 56-59; R. pp. 342-343].

The appellant is a subject of Japan and the nationality of the vessel is deemed that of her owner (Point 2, pp. 36-37, *supra*). The U. S. Attorney *admitted* that the vessel was *"seized more than one hour's sailing distance from shore"* [R. p. 150]. The Government had no power to make the seizure (Point 3, pp. 38-46, *supra*), hence the officer of the coast guard had no *power* to demand the manifest.

United States v. 1,197 Sacks etc., 47 F. (2d) 284, 285;

The Pictonia, 20 F. (2d) 353, 354.

The vessel was not bound to the United States [R. pp. 271, 277, 279, 282]. She was at the place of seizure to take bearings in a fog and her presence there was not a violation (Point 36, pp. 107-108, *supra*). The failure to

produce a manifest was not a violation justifying the seizure.

The case of *United States v. 1,197 Sacks of Intoxicating Liquors*, 47 F. (2d) 284, is directly in point. In that case, the Fannie Power was in distress and transferred the cargo consisting of liquor, to "John N. Hathaway". The latter was seized with the liquor on board. One of the grounds of forfeiture was that her master failed to produce a manifest, and it was held that in such case, the statute did not require a manifest. The court per Thomas, *J.*, said at page 285:

> "The libelant further claims that the cargo is subject to forfeiture because of the fact that since there was no manifest, the master of the boat is considered the consignee of the cargo. The decisions dispose of this contention adversely to the libelant, and the courts have held that a manifest is required only where a vessel is bound to the United States, and that no official of the Government has the right to demand a manifest beyond 12 miles of the coast of the United States. See, The Pictonian (C. C. A.), 20 F. (2d) 353. The master can only be considered the consignee where it appears that the cargo was under his control. In the instant case the evidence is direct and persuasive that the cargo was under the control of the claimant's son, and that the master had no supervision of the control of the cargo. Besides, the fact that the Power was in distress is sufficient answer to the return claim. * * *."

POINT 39.

The Finding That the Vessel Was Seized Within Four Leagues From the Coast of the United States Is Against Libelant's Own Evidence and the Assignment of Error to That Finding Presents Error.

The trial court found as a fact that the vessel was seized between 10 and 11 miles from the coast of the United States [Find. I, R. p. 316], and as a conclusion found that it occurred within 4 leagues [Con. II, R. p. 319]. Appellant assigned that as error [Error 78, R. p. 347].

The Government's witness Dwight [R. p. 73], testified that when he first observed the vessel, she was "a mile and a half" from his boat [R. pp. 80-81]. He said that she was at that point 10 miles from San Juan Point [R. pp. 77, 81]. He testified that he arrived at the figures by "my dead reckoning position" [R. p. 77]. This position he claimed he arrived at "was by dead reckoning running from San Clemente Island" [R. p. 77]. He said "I couldn't see any land marks whatsoever to determine the exact position. That is the reason I took no bearings with reference to land marks, because I could see no land marks to take position from" [R. p. 77]. He gave as a reason for that "It was hazy at the time" [R. p. 80]. He said, "due to hazy weather, and visibility was very poor" [R. p. 77].

Assuming, but not admitting, that Dwight's testimony is the correct version of the distance, a careful consideration would show that the seizure was made *more* than 4 leagues from the coast of the United States. It will be recalled that he testified that when he first sighted the vessel, she was at a distance of about a mile and a half from where he encountered her [R. p. 81]. The weather was hazy and "visibility was very poor" [R. p. 77], and he could not determine "the exact position" [R. p. 77]. However, he must have traversed in her direction at least one mile when he first sighted her. Adding the one mile to the 10 miles which he said he traveled when he first sighted her, that would be 11 *nautical* miles. 11 nautical miles equals 11.00, and multiplying that at the rate of 6,080 feet per nautical mile, equals 66,880 feet. In order to ascertain how many "leagues" is in the 66,880 feet, the item above referred to, it is necessary to ascertain the number of feet per one Statute or English mile. One Statute or English mile is 5,280 feet.

> *Wrinkles on Practical Navigation,* First Ed., Ch. 2, pp. 4-7.

Converting the 66,880 feet into Statute or English miles is 5,280 feet. Converting the 66,880 feet into Statute or English miles equals 12.66 Statute or English miles. Converting the 12.66 Statute or English miles into leagues equals 4 leagues *plus 66/100 miles.* This computation shows that the trial court erred in his conclusion and finding that the seizure was made within 4 leagues.

The measures of England were brought to the Colonies and became part of the common law of the United States.

Dwight, etc., v. Am. Ore Recl. Co., 263 Fed. 315, 317;

Thompson v. Dist. of Columbia, 21 App. D. C. 395, 402.

"In English-speaking countries a league is estimated at 3 miles."

Bolmer v. Edsall, 90 N. J. Eq. 299, 307.

The statute or English mile consists of 5,280 feet."

Wrinkles on Practical Navigation, 1st Ed., Ch. 2, pages 4-7.

A marine league is equivalent to 3 geographical miles or 2 sea miles.

Rockland, etc. SS. Co. v. Fessenden, 79 Me. 140, 148.

POINT 40.

The Collector of Customs Had No Power to Destroy the Cargo and the Conclusion of Law That It Was Rightfully and Lawfully Disposed of by Him Is Against Law and Is Erroneous.

The trial court found as a fact that the Collector of Customs *destroyed* the cargo under the provisions of Sections 607 and 608 of the Tariff Act of 1930 [Find. VI, R. pp. 313-314], and as a conclusion of law, found that the cargo was "rightfully and lawfully disposed of" by him [Con. I, R. p. 319].

Appellant assigned that as error [Error 66, R. p. 345; Error 77, R. p. 347].

Finding of fact VI [R. pp. 313-314] is to the effect that the Collector of Customs, upon complainance with the provisions of Section 608 of the Tariff Act of 1930 disposed of the cargo by destroying it. That *implies* that Section 608 of the Tariff Act of 1930 authorized and empowered the Collector of Customs to destroy the cargo. This court will in *vain* search that section for such authority, because it does *not* authorize or empower the Collector of Customs to destroy the cargo, and, yet, the trial court, based upon that finding, made a conclusion of law that the Collector of Customs "rightfully and lawfully disposed of" the cargo [Con. I, R. p. 319]. It must be obvious to the court as it is to us that the said finding of fact and conclusion of law is a miscarriage of justice.

The Collector of Customs had no *power* to destroy the cargo for nine reasons, to wit:

(1) The Congress directed that the vessel or merchandise seized "shall be placed and *remain* in the custody of the Collector of Customs in which the seizure was made to *"await disposition according to law."*

§605 *Tariff Act* 1930, 46 U. S. Stat., Part I, p. 754.

(2) The Congress also commanded that if the appraised value of the vessel or merchandise does not exceed $1000.00, the Collector shall cause a notice to be published of the seizure and "the intention to *forfeit* and *sell* the same," in the same manner as merchandise abandoned to the United States is sold. If the appraised value exceeds $1000.00, the Collector must transmit a report of the case to the Attorney for *"institution of the proper proceedings for the condemnation of such property."*

§§607, 608, 609, 610 *Tariff Act* 1930, 46 U. S. Stat., Part I, pp. 754-755.

(3) The Congress further directed that if a "sale or use" of the merchandise be prohibited, "under any law of the United States or of any State," the court, upon the request of the Secretary of the Treasury, may provide in its *decree* of forfeiture that it shall be delivered to the Secretary, who may, in his discretion, destroy its or manfacture it into an article that is not prohibited.

§619 *Tariff Act* 1930, 46 U. S. Stat., Part I, p. 755.

(4) The Government had no power to seize the vessel and its cargo at the place where she had been seized.

46 *U. S. Stat.*, 2446-2449;

Point 3, pp. 38-46, *supra.*

(7) The immunity on the high seas from seizure of the vessel included the cargo and everything on board.

Ford v. United States, 273 U. S. 593, 610.

(8) The Convention provided that in case of a seizure, the vessel must be taken into a port for "*adjudication in accordance with such laws.*"

46 *U. S. Stat.*, 2446-2449;

Point 3, pp. 38-46, *supra.*

(9) The phrase for "*adjudication in accordance with such laws*" contemplated a *trial* before a court of competent jurisdiction.

United States v. Irwin, 127 U. S. 125, 129;

The Scotland, 105 U. S. 24, 29;

Hovey v. Elliott, 167 U. S. 409, 414.

The statutory provisions and the Convention show that the Collector of Customs had *no power to destroy the cargo before a decree was made by a court of competent Jurisdiction.* And, yet the trial court made a conclusion of law that the cargo was "rightfully and lawfully disposed of" by the Collector of Customs under the provisions of Section 607 of the Tariff Act of 1930." Obviously, that conclusion of law is not alone erroneous, but is contrary to and against law.

POINT 41.

Appellant Is Entitled to the Return of the Property Taken From His Possession Under the Unlawful Seizure.

The Government had no power to make the seizure under said Convention between the United States and Japan.

Point 3, pp. 38-46, *supra.*

The Government had no power to make the seizure under the most favored nation clause of said treaty between the United States and Japan.

Point 4, pp. 47-49, *supra.*

It is settled that where property is taken under an unlawful seizure, the person from whom it is taken is entitled to its return.

The Apollan, 22 U. S. (9 Wheat.) 362, 373, 379;
Weeks v. United States, 232 U. S. 383, 398;
Amos v. United States, 255 U. S. 313, 316;
United States v. Porazzo Bros., 272 Fed. 276, 277;
United States v. Burns, 4 F. (2d) 131, 132.

POINT 42.

This Court Should Appoint a Commissioner or Assessor to Hear and Report the Damages Sustained by Appellant Through the Unlawful Seizure.

The libelant admitted that the collector of customs destroyed the cargo after this libel was filed and before its adjudication and it will not be denied that the libelant sold the vessel under the decree appealed from an after the appeal was taken.

The Collector of Customs took possession of the cargo as *"quoad hoc* the mere official keeper for the court."

Burke v. Trevitt, 4 Fed. Cas. No. 2, 163.

He was required by statute to *retain* the cargo to *"await disposition according to law."*

§605 *Tariff Act* 1920, 46 U. S. Stat., Part I, p. 754.

The Collector of Customs had no power to destroy the cargo, because the Government had no power to make the seizure.

Point 40, pp. 115-117, *supra.*

The appeal arrested the jurisdiction of the District Court and, thereafter, the court had no power to take any action in the matter without leave of this court.

Baltimore SS. Co. v. Phillips, 9 F. (2d) 902;

The American Shipper, 70 F. (2d) 632, 634.

The court had no power to adjudicate the vessel and cargo, and therefore had no power to enforce its decree, because the Government had no power to make the seizure.

Point 3, pp. 38-46, *supra.*

In a case where the Government had no power to make the seizure, the person from whom the property is taken is entitled to its return.

Point 41, p. 118, *supra.*

Is the appellant to be turned out of this court with a mere idle victory, if he is successful on this appeal? It does not follow that because the cargo was destroyed and the vessel sold, that appellant should be turned out of court with a mere idle victory. He is entitled to redress for the wrongful taking of the property from his possession. This court has the power to righten that wrong.

In the case of *United States v. Thekla,* 266 U. S. 328, the court, per Holmes, J., said at page 339:

> "* * * When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it. When the question concerns what would be paramount claims against a vessel libeled by the United States, were the vessel in other hands, the moral right of the claimant is recognized. * * *"

See, also:

The Western Maid, 257 U. S. 419, 433, 434;
The Siren, 74 U. S. (7 Wall.) 152, 159.

The appeal in an admiralty proceeding is a trial *de novo*.

Point 12, pp. 62-64, *supra*.

The appeal opens the whole case as if both parties had appealed.

Irvine v. The Hesper, 122 U. S. 256, 267.

The libel proceeding is deemed pending until the final determination of the appeal. The court, in the progress of an admiralty suit, in a case where it deems it "expedient or necessary for the purposes of justice," may appoint one or more commissioners or assessors "to hear the parties and make a report therein."

U. S. Sup. Ct. Admiralty Rule 43.

This is a proper case where the court should exercise the discretion and invoke said rule, and appoint a commissioner or assessor to hear and report appellant's damages, in order to prevent a miscarriage of justice, so that appellant should not be turned out of court with an idle victory if successful on his appeal.

It is settled that in a case of unlawful seizure, the person whose property was taken is "entitled to receive from the United States the fullest compensation for their loss and damage."

The Frances Louise, 1 F. (2d) 1006;

The William H. Bailey, 103 Fed. 799;

Irvine v. Hesper, 122 U. S. 256, 267.

The Apollan, 22 U. S. (9 Wheat.) 363, 379.

POINT 43.

The Decree, if Sustained, Will Subject the Government to Refund Over $50,000,000.00 Light Money Collected.

The Apostles on Appeal show an anomalous situation. The Government regarded the nationality of the vessel as Japanese for the purpose of collecting light money, and regarded her nationality as American for the purpose of forfeiture. She cannot be both. If she is an American vessel, the Government had no right to collect light money. If she is a Japanese vessel, the Government had a right to collect light money, but had no right to seize her at the place where she had been seized. If the decree appealed from is sustained, it will subject the Government to refund over $50,000,000.00 "light money" collected, not alone from the vessel in suit but from *thousands* of similar vessels on the Pacific Coast.

POINT 44.

The Refusal to Rule Separately on Appellant's Requests to Find, Was a Violation of the Spirit and Intent of Admiralty Rule 46½.

Appellant requested the trial court to find [R. p. 190], certain specific facts [R. pp. 191-201], and conclusions of law [R. pp. 202-207]. The trial court made an omnibus ruling denying all the requests [R. p. 208]. Supreme Court Admiralty Rule 46½ provides that "the court of first instance shall find the facts separately and state separately its conclusions of law thereon." The object of that rule was to do away with *implied* findings and to facilitate the review of an appeal so that the case may be investigated independent of the facts, lessen the labor of the appellate courts, and lessen the expense of printing unnecessary parts of the record. The rule intended to apply to *proposed* findings as well as the findings made by the court. The refusal of the trial court to rule separately, casts an unnecessary burden on this court, and an unnecessary expense on appellant.

POINT 45.

If Appellant Is Successful on This Appeal He Is Entitled to Recover the Costs in This Court and of the Court Below.

In an admiralty proceeding, when the decree appealed from is reversed in this court, the appellant is entitled to recover the costs of the appeal against the United States.

28 *U. S. C. A.* §870.

James Shewan & Sons, Inc., v. United States, 267 U. S. 86, 87;

United States v. Thekla, 266 U. S. 328, 339;

The Pasadena, 55 F. (2d) 51, 52.

Appellant is also entitled to recover the costs of the court below against the United States.

46 *U. S. C. A.* §743;

James Shewan & Sons, Inc., v. United States, 267 U. S. 86, 87;

The Lily, 69 F. (2d) 898, 900;

The James McWilliams, 49 F. (2d) 1026, 1027;

The Verona, 40 F. (2d) 742, 743.

POINT 46.

Admiralty Rule 1 of This Court Is Obsolete Because It Was Superseded by Statute. It Should Be Repealed to Avoid Confusion and Injustice That May Result.

Admiralty Rule 1 of this Court provides that an appeal from "an interlocutory of final decree" to this court—

> "shall be taken by filing in the office of the Clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of. * * *"

The said rule was adopted on May 21, 1900 (100 Fed. iii).

The official rules published contains a footnote to the effect that said rule modifies Rule 11 of the General Rules, that a petition on appeal and allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal, and refers to the case of *Kenney v. Louie,* No. 939, "motion to dismiss appeal denied May 6, 1903".

28 USCA §230, approved June 30, 1926, reads in part as follows, to wit:

> "No * * * appeal intended to bring any judgment or decree before a Circuit Court of Appeals for review shall be allowed unless application therefor be duly made within three months * * * ".

The phrase *"any* judgment or decree" means "all" judgments.

3 C. J. 239, §6, Note 57.

That construction was applied to a case involving a removal from a State to a Federal court.

Cochran v. Montgomery County, 199 U. S. 260, 272;

3 C. J. 237, §6, Note 5.

This court may make rules "not inconsistent with the laws of the United States".

28 U. S. C. A. §723.

Rule 1 of the Admiralty Rules of this Court is *inconsistent* with the provisions of 28 USCA, §230, because the rule states that an appeal may be taken to this Court by filing of a notice of appeal and serving a copy thereof on the adverse party, whereas the Statute provides that an appeal cannot be taken as a matter of course, but only in the *discretion* of the Court below.

A subsequent Statute supersedes a prior rule relating to appeals.

Robbins, etc., v. Chesborough, 216 Fed. 121, 122.

> "If there is anything inconsistent with this holding in admiralty rule" it must give way to "the act of Congress."
>
> *The City of Naples,* 69 Fed. 794, 795.
>
> "The rule, as construed and applied in this case, is inconsistent with the laws of the United States, and therefore invalid."

That ruling was made regarding Rule 22 of this Court. *Davidson Marble Co. v. Gibson,* 213 U. S. 10, 19.

This point is not involved in the instant case, because appellant followed the procedure of the Statute instead of the rule [R. pp. 326, 327, 356]. However, appellant felt that he should call the foregoing to the attention of this court, with a view that said rule may be repealed in order that the members of the Bar be informed to follow the Statute, instead of the rule, to prevent injustice which may result therefrom.

CONCLUSIONS.

It is respectfully submitted that for the foregoing reasons, the decree appealed from should be reversed, and the libel dismissed with costs to appellant of this appeal and costs of the court below, and that this court should appoint a commissioner or assessor to hear and report the damages sustained by appellant by reason of the seizure, and that appellant have judgment against the libelant for the sum to be found due him with costs of the reference, and for such other and further order and relief as to this court may seem meet and proper.

Respectfully submitted,

MAX SCHLEIMER,
Proctor for Claimant and Appellant.

Grant Building,
355 South Broadway,
Los Angeles, California.
TUcker 7714.

Dated March 14, 1935.

No. 7681

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TOICHI TOMIKAWA,
Claimant and Appellant,

vs.

AMERICAN OIL SCREW "PATRICIA," No. 970-A, her cargo, engines, tackle, apparel, furniture, etc.,
Respondent,

UNITED STATES OF AMERICA,
Libelant and Appellee.

Petition for Rehearing

PEIRSON M. HALL
United States Attorney

JOHN J. IRWIN
Assistant United States Attorney

Federal Building
Los Angeles, California
Attorneys for Appellee

Independent-Review, Law Printers, 222 So. Spring St., Los Angeles, TU 1177

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Respondent,

UNITED STATES OF AMERICA,
Libelant and Appellee.

Petition for Rehearing

To the Honorable Circuit Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the libelant and appellee herein, the United States of America, and respectfully requests this Honorable Court to grant a petition for rehearing in the above entitled appeal and bases its petition for said rehearing upon the following grounds:

Grounds For Rehearing

The basis for the request for rehearing in this matter is founded upon the opinion of this Honorable Court,

filed February 10, 1936, and the reasons stated in said opinion for the reversal of the decree entered below. Said grounds are summarized as follows:

I. Any defect in the form of the libel was waived in the court below by failure of the respondent to except thereto and the defect which was stated in this Court's opinion did not prejudice the rights of respondent.

II. The demand for the production of the manifest, although actually made by a seaman of the Coast Guard, was made at the direction of and in the presence of an officer of the Coast Guard.

III. The failure to produce a manifest incurs the penalty of the value of the cargo on board to the same extent as producing an incorrect manifest.

IV. The vessel involved was engaged in the cargo carrying trade and, being an American domiciled vessel, was not entitled to do so because it was neither licensed nor documented, but only a "numbered" vessel.

I.

Any Defect in the Form of the Libel Was Waived in the Court Below by Failure of the Respondent to Except Thereto and the Defect Which Was Stated in This Court's Opinion Did Not Prejudice the Rights of Respondent.

This case was tried and presented in the court below, and in this Court, on the theory that the vessel was bound to the United States, and no exception to the sufficiency of the allegations of the libel as amended was made either in the court below or here.

In none of the one hundred assignments of error asserted by the appellant was any such objection raised, which indicates that the appellant recognized he had waived any claim he might have that the libel did not state a cause of action because it failed to allege, in so many words, "that the vessel was bound to the United States." Going through this Record, as appellant did, in search of error, he would certainly have asserted such a defect if he felt he was entitled to take advantage of it.

The libel in the instant case alleged, we respectfully submit, in general terms all the essential averments to lay a ground for forfeiture. Pertinent allegations are those set forth in paragraphs III and IV of count two of the amended libel (R. 27), and particularly the second paragraph of paragraph III, which stated:

> "That the said Master, T. Tomikawa, failed and refused to produce said manifest in response to the demand of the said officer in violation of Section 584 of the Tariff Act of 1930, 19 U. S. C. A. 1584."

We respectfully contend that it is necessarily implied from said allegations that the vessel was bound to the United States or there could have been no violation of Section 584 of the Tariff Act of 1930 as claimed. Certainly the claimant was not prejudiced or misled by lack of a more specific statement. He introduced evidence on the point of the vessel's being bound to the United States and by his own evidence proved that it was. This is clearly shown by the following excerpts from the Record.

The claimant himself, in answer to his proctor's question, stated (R. 267):

> "* * * then I started back from San Diego to come to San Pedro again."

And in answer to the Court's question on the same matter, the claimant said (R. 268):

> "Q. Where did you take the boat?
> "A. From the point where the engine stopped, we tried to come back to San Pedro."

Furthermore, the proctor for the claimant not only did not object to these proceedings on the ground that it was neither alleged nor proved that the vessel was bound to the United States, but he expressly admitted that fact in his brief filed in this Court. In respondent's typewritten "Reply Memorandum for Claimant and Appellant," in the last line on page 2, he states:

> "* * * and on the way back to San Pedro, the vessel was seized (See R. pp. 268-273.)"

In support of our argument on this point we respectfully refer to the following decisions of the Supreme Court of the United States.

In the case of *Friedenstein v. United States,* 125 U. S. 224, 31 L. Ed. 736, the Court held:

> "* * * any defect in the information which could have been availed of by demurrer, or by exception, or by a motion to dismiss at the trial, made on the ground of such defect, or by a motion in arrest of judgment, must be regarded as having been waived, or as having been cured by the verdict."

In the case of *The Quickstep,* 9 Wall, 665, 19 L. Ed. 767, the Supreme Court said:

> "It is objected that the libel is too general in its terms, and is defective because it does not state the particular acts of negligence and misconduct on the part of the tug which produced the injury; but if this were necessary, the objection should have been interposed at an earlier stage of the proceedings, and cannot be taken, for the first time, after the cause has reached this court. It is always better to describe the particular circumstances attending the transaction; but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libellant, if the court can see there was no design on his part in omitting to state them."

To the same effect see *San Juan Light Co. v. Requena,* 224 U. S. 89, 56 L. Ed. 680.

The injury to the libelant in the decision of this Court reversing the decree of forfeiture of the court below in

so far as said reversal is based upon the failure of the libel to allege "that the vessel was bound for the United States" is far greater than would have been the result had exception been taken to the libel for that reason in the court below, for certainly the libelant would have been permitted to amend the libel had such exception been taken, under the generally recognized liberality of pleading in admiralty cases. Had such an objection been raised after trial in the court below, the same liberal rule of amendment of pleadings would undoubtedly have been granted libelant, primarily because such amendment would be merely to conform to the proof as found by the court below in finding of fact number I. (R. 311.) The vessel in question was "traveling toward the coast of the United States."

For the reasons given, we respectfully submit that the libel herein should not be dismissed on the ground stated. However, if this Court feels that the libel was deficient in failing to assert, in so many words, "that the vessel was bound for the United States," a rehearing should be granted herein and the libelant permitted to amend its libel so as to include said allegation.

II.

The Demand For the Production of the Manifest, Although Actually Made by a Seaman of the Coast Guard, Was Made at the Direction of and in the Presence of an Officer of the Coast Guard.

The demand for a manifest was made by a seaman at the direction of an officer of the Coast Guard as shown by the evidence in these proceedings. Under the general

principles of agency such a demand by the seaman acting under orders of his commanding officer and in the presence of such officer may properly be considered a demand of the officer. We respectfully submit that the term "officer" as used in Section 584 of the Tariff Act of 1930 should be liberally construed to effect the purpose intended by such Statute. In this case, according to the testimony (R. 75-76), the officer in command of the Coast Guard cutter, Frederick J. Dwight, testified in effect that he hailed the vessel but it did not stop; that he motioned to the two men in the pilot house and asked them why they did not stop; that he asked one of the men what his cargo was and he was told the vessel had a cargo of abalones; that he placed a seaman on board the Patricia who reported to him that they had no papers and that the captain was left at Turtle Bay; and that, not satisfied with this information, he went on board himself and lifted up the main hatch and found the vessel loaded with sacked liquor. Now we submit that under such circumstances the sending of the seaman on board in the presence of the commanding officer to demand an inspection of the papers of the vessel, particularly where it is evident that the demand comes from a Coast Guard officer, is sufficient compliance with said Section 584. It surely was evident that the officer was demanding the papers, and the pertinent portion of Section 584 is as follows:

> "* * * who does not produce the manifest to the officer demanding the same."

Furthermore, there is not any showing in this case that the operators of the libeled vessel questioned the

right of the seaman to make a demand for the papers or insisted that the demand should be made by the Coast Guard "officer."

As just stated, the commanding officer of the Coast Guard cutter sent seaman first class Blondin on board the Patricia when the Coast Guard cutter came along side. He went in and asked for the Master of the boat and was told the Master of the boat was left in Turtle Bay. He then stated, "I asked for a manifest and registration papers, and he said he didn't have any." One of the men on board the Patricia at the time, Mr. Hirata, testifying as a witness for the claimant, admitted that when the Coast Guardsman came on the boat he was asked for his papers and said, "I told him I didn't have any." There can be no question then but that a demand was made for the manifest, but no manifest was produced because the vessel did not have any. Now as to the demand being that of an officer within the meaning of Section 584, it is hard to understand how it can be ruled that the demand in this case was otherwise. The officer in charge of the Coast Guard Cutter sent the seaman on board the vessel Patricia. This is not an unusual occurrence, but is of such frequent occurrence that the Coast Guard officers and seamen usually function in the manner they did in this case. There might be some reason for holding that the demand of the seaman for a manifest was unwarranted if the seaman on his own initiative, without any orders from his commanding officer and away from the presence of such officer, demanded the production of a manifest from the captain of a vessel. The captain would have the right to question his author-

ity. But here we have a Coast Guard cutter stop a vessel at sea, draw along side the vessel, place a seaman on board for inspection of the vessel and its cargo as authorized by the customs laws (Section 581 of the Tariff Act of 1930, Title 19, U. S. C., Sec. 1581). Furthermore, an "officer" authorized to make searches and seizures under the customs laws is likewise authorized "to demand of any person within the distance of three miles to assist him in making any arrests, search, or seizure authorized" by the customs laws. (R. S. 3771, Title 19, U. S. C., Sec. 507.)

We respectfully submit, therefore, that under the circumstances as shown by the evidence in this case the demand for a manifest was a demand of an officer within the meaning of Section 584 of the Tariff Act of 1930. Incidentally may we say that in any event it is apparent from the evidence in this case that there was no manifest on board the vessel. The testimony of the officer in charge of the cutter (R. 75) was that he placed the seaman Blondin on board in the first instance and "Blondin reports to me that they have no papers and that the *Capitan* was left at Turtle Bay." A new or second demand under these circumstances by the officer in charge of the Coast Guard cutter for the production of the manifest would have been an idle act, which is emphasized by the fact, as is also testified by said Coast Guard officer (R. 75-76), that he was told by those on board the Patricia in answer to his question that they had a cargo of abalones and when he went on board himself and looked in the main hatch he found that it was loaded with sacked liquor.

It is certain from the evidence in this case that no manifest of the cargo was produced and it has not been contended by the claimant that the cargo was manifested. Under these circumstances the penalty for failure to produce a manifest is incurred.

The Maskinonge, 63 F. (2d) 311 (C. C. A. 1st);
The Throndyke, 53 F. (2d) 239 (D. C. N. J.), 67 F. (2d) 198 (C. C. A. 3rd), *certiorari* denied, 291 U S. 659.

III.

The Failure to Produce a Manifest Incurs the Penalty of the Value of the Cargo on Board to the Same Extent as Producing an Incorrect Manifest.

This Court in its opinion apparently concludes that because there was no manifest produced the penalty of the value of the manifest found on board could not be asserted against this vessel because no manifest was found on the vessel in disagreement with the merchandise included or described in the manifest. We respectfully point out that the Circuit Court of Appeals for the Fourth Circuit in the case of *Gillam v. United States*, 27 F. (2d) 296, held that where a liquor laden vessel produced no manifest rather than a false one the penalty for the value of the cargo was not precluded nor was an imposition of the $500.00 penalty only required. *Certiorari* was denied as to this case by the United States Supreme Court in 278 U. S. 635, 73 L. Ed. 552.

May we respectfully point out that to rule otherwise would put a premium upon failure to have a manifest at all because under such a ruling the only penalty that

could be prescribed would be a $500.00 penalty and the penalty for the value of the cargo could be avoided. We submit that such is not the intention of Section 584 of the Tariff Act of 1930.

IV.

The Vessel involved Was Engaged in the Cargo Carrying Trade and, Being an American Domiciled Vessel, Was Not Entitled to do so Because it Was Neither Licensed Nor Documented, But Only a "Numbered" Vessel.

There can be no question from the evidence in this case that the vessel Patricia engaged in the cargo carrying trade. The allegation of the libel in this regard is that the vessel engaged in a trade in violation of Section 4189 R. S. It was established in the evidence that the vessel was a numbered vessel and likewise that she was engaged in trade. The numbering of a vessel under the provisions of Section 288 of Title 46 of the United States Code is evidently for the purpose of permitting the Collector of Customs to keep track of said vessels and for no other purpose. It clearly does not authorize a vessel to which a number is awarded to engage in trade either coastwise or foreign but is sometimes used as it is alleged was done in this case to cloak such operations. This vessel, being owned by a person who was not a citizen of the United States, was prohibited from engaging in trade under the provisions of Sections 290 and 833 of Title 46 of the United States Code, and it is apparent from the evidence in this case that the vessel was using its number to obtain ingress and egress from United

States Ports so as to avoid the penalty provided by those Sections just quoted which prohibit a foreign owned vessel from engaging in trade on an equal footing with vessels of the United States.

On this basis we respectfully submit that the evidence presented in regard to the Patricia that she was engaged in trade establishes the penalty provided by Section 4189 R. S. (Title 46, U. S. C. Sec. 60) in that said number was a record or document granted in lieu of a registery, enrollment, or license and that said number was granted solely to permit said vessel the right to leave and enter ports of the United States but that said number did not entitle the vessel to engage in trade, which it did, and that it follows as a necessary conclusion that the vessel was using said number as a cloak for its cargo carrying and as a cargo carrying vessel it was not entitled to the benefit of the number awarded it. To rule otherwise is to hold in effect that vessels owned by resident aliens claimed by their owners to be fishing boats only and assigned a number by the Collector of Customs to identify them and permit them to enter and leave ports of the United States under said number and without further inquiry or inspection is to permit said vessels to operate out of American ports in entire disregard of the laws of the United States and to give to said vessels and their owners an appreciable advantage over vessels of the United States, which are required to strictly observe in greatest detail the laws of registery, enrollment, and documentation as provided in Title 46 of the United States Code.

V.
Conclusion

For the reasons herein stated we respectfully request that this Court grant a rehearing in this matter to the end that the forfeiture sought by the United States in this case of the vessel in question may be re-presented to this Court. All of the points hereinabove made in support of this petition can be reinforced and elaborated upon, and we respectfully request permission to do so. Upon a rehearing of this matter the value of the vessel in question is not the sole issue in this forfeiture case. The vessel has been sold and the money held in the Registery of the Court to abide final decision herein. Such disposition was necessary because of the long delay involved in this matter and the deterioration of the vessel in question. Claimant at all times had an opportunity to take the vessel out upon bond but refused to do so, so that said disposition of the matter is not without fair notice to him or regard for his rights. The question of the disposition of the cargo of this vessel involves a much more substantial amount and hinges entirely upon the ruling in this case. Likewise the principles announced by this Court in its opinion must of necessity be a guide to the District Courts in this Circuit in similar cases, and we respectfully submit that the ruling as announced by this Court in this matter is a serious handicap to the Government officers in their enforcement of the customs

and shipping laws of the United States. We respectfully request, therefore, that a rehearing be granted in this matter.

PEIRSON M. HALL,
United States Attorney,

JOHN J. IRWIN,
Assistant United States Attorney,

Attorneys for Appellee.

No. 7681

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

TOICHI TOMIKAWA,
Claimant and Appellant,

vs.

AMERICAN OIL SCREW "PATRICIA", No. 970-A, her cargo, engines, tackle, apparel, furniture, etc.,
Respondent,

UNITED STATES OF AMERICA,
Libelant and Appellee.

BRIEF OF APPELLEE

PEIRSON M. HALL,
United States Attorney,

J. J. IRWIN,
Assistant United States Attorney,

Proctors for Appellee.

Independent-Review, Law Printers, 222 So. Spring St., Los Angeles. TU 1377

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In the

United States Circuit Court of Appeals

For the Ninth Circuit.

TOICHI TOMIKAWA,
Claimant and Appellant,

vs.

AMERICAN OIL SCREW "PATRICIA", No. 970-A, her cargo, engines, tackle, apparel, furniture, etc.,
Respondent,

UNITED STATES OF AMERICA,
Libelant and Appellee.

BRIEF OF APPELLEE

Replying to the lengthy and elaborate Brief of Appellant, it shall be our purpose to restrict ourselves to what we believe constitutes the main issue, to-wit: was the appellant entitled to the benefits of the convention between the United States and Japan, proclaimed January 16, 1928.

Statement of Facts

In approaching consideration of this question may we adopt appellant's statement of the nature of this appeal, set forth on page 3 and a portion of page 4? We believe it is necessary to add, however, the following facts:

The libel in question was filed April 28, 1932, following the seizure of the American Oil Screw "Patricia," No. 970-A, on March 23, 1932, by the Coast Guard, off the California Coast, more than an hour's sailing distance from land. The libel so filed proposed to libel the boat "Patricia," *her cargo,* (italics ours) engines, tackle, apparel, furniture, etc. (R. 5, 9.)

The monition was issued pursuant to the prayer of said libel on the 28th day of April, 1932, against the said American Oil Screw "Patricia," *her cargo* (italics ours), etc. Thereafter, to-wit: on the 28th day of April, 1932, return of the monition so issued as aforesaid was made except examination of that return indicates that the Marshal attached only the American Oil Screw "Patricia" and did not attach the *cargo* (italics ours). (R. 14.)

It further appears that on or about the 17th day of October, 1932, the answer of claimant herein to said libel was filed, said answer being duly verified (R. 15-22). (It will be observed from an examination of the opening paragraph, page 15, that no claim is advanced for the cargo.) Thereafter, to-wit: on or about the 29th day of March, 1933, libelant filed an amended libel of information (R. 25-29). Previous to this time, to-wit: on or about the 28th day of April, 1932, proclamation was read in open court (R. 31) by the United States Marshal, at which time the claimant and appellant herein appeared especially in open court and filed his petition to quash the seizure and process and proceedings based thereon. (R. 31-37.) In that petition (R. 34) it was alleged by claimant that he was the owner of the vessel "Patricia" with its engines, tackle, apparel and furniture.

(It will be observed that at no place in said petition was any claim made for the cargo.) After said petition had been filed at the same time and date, on motion of the United States Attorney default of all parties not appearing was entered. (R. 40.) Thereafter proceedings were had from time to time and motion to quash was denied following which claimant and appellant filed his answer as aforementioned. Subsequent thereto, to-wit: on or about the 29th day of June, 1933, the court entered its decree dismissing the said libel. Shortly thereafter, to-wit: on July 12, 1933, libelant filed a motion to vacate said decree of dismissal. The claimant and appellant on the 17th day of July, 1933, filed his answer to libelant's motion to vacate final decree and findings of fact and conclusions of law. Said motion was thereafter granted. On the 6th day of April, 1934, the Honorable District Judge made his order sustaining counts 2 and 3 of the amended libel and directed the entry of a decree in conformity therewith (R. 178, 180). Subsequent thereto, to-wit: on or about the 9th day of August, 1934, proposed Findings of Fact and Conclusions of Law and Decree were signed (R. 311, 321). It will be observed that the decree of forfeiture does not make any reference to the *cargo*. It is an appeal from this last mentioned decree of August 9, 1934, that appellant invoked the intercession of this court.

Questions of Law

As stated at the outset of this brief the principal question for decision is whether or not the claimant comes within the provisions of the convention between Japan and the United States heretofore alluded to.

I.

The Court Had the Power to Vacate Its Order and Decree of June 29, 1933.

For the sake of coherence we believe it will prove helpful to take up Point 12 of appellant's brief for first consideration.

Point 12 (appellant's brief, p. 62) challenges the power of the District Court to vacate the decree dismissing the libel dated June 29, 1933. In meeting the contention of the appellant it is but necessary to consider his own authority cited at page 62. At the bottom of that page appellant cites 1 *Corpus Juris,* 1339, Note 65, as his principal authority supporting his assertion "the granting of a new trial in admiralty is unknown." An examination of that citation leads to an inspection of footnote 64 which footnote in turn directs the briefer to Par. 286, on page 1342 of the same volume, wherein it is stated:

> "a court of admiralty has power on seasonable application therefor to reopen for a rehearing a decree entered under a misapprehension of the facts or on improper evidence."

It cannot be questioned that the motion to vacate was made seasonably for the record shows it was filed on July 12, 1933, which was thirteen days subsequent to the decree of dismissal (R. 173, 174). It is apparent therefore that in the citations under Point 12 of his brief appellant has failed to distinguish between a new trial

and motion to vacate decree of judgment. We accordingly submit that the order vacating said decree was proper on plaintiff's own authority.

1 *Cor. Jur.* 1339, 1342 as aforementioned.

II.

In an Action of Forfeiture in a Libel Such as is Here in Issue Probable Cause is Shown For Search. The Burden of Proving Their Exemption From the Forfeiture Sought Shifts From the Libelant to the Claimant.

The evidence is undisputed that when the boat "Patricia" was cited by the Coast Guard it was within four leagues of the coast (R. 771), had the number 970-A on its bow and on its stern the letters "L.A." in large capital letters, indicating "Los Angeles." It was likewise low in the water, indicating it was heavily laden. It was not flying the flag of any country. In the absence of a treaty to the contrary the Customs Laws permit the boarding of a vessel within four leagues of the coast to inspect its manifest. The testimony is clear and undisputed that after the Coast Guard cited the "Patricia" it came along side. Coast Guardsman Blondin went aboard the "Patricia." He was informed that they had no papers. Under the Customs Laws, the absence of papers plus the fact the boat being heavily laden in the water, amply warranted the subsequent search of the "Patricia" which revealed the contraband liquor. More than that, under the Customs Laws a failure to have a manifest

and papers is authorization for the Coast Guard to bring such vessel into port.

Sec. 581 *Tariff Act of 1930* (Title 19, *USCA* 1581) Re: Boarding;

Sec. 1615, Title 19, *USCA,* Re: Burden of Proof.

Probable cause having been shown for the search and seizure which preceded and is the basis for the instant libel, the burden of exempting the "Patricia" from the operation of the Customs Laws devolved upon the claimant, i.e., the burden of proving that to that end, the "Patricia" at the date of seizure came within the operation of the convention of 1928 between Japan and the United States.

Under Title 19, Sec. 1615, see Prima Facie case. *The Luminary,* 21 U. S. 407;

Probable Cause—"Present Circumstances Creating Suspicion," 267, 967; 256 F. 301.

III.

The American Oil Screw "Patricia" at the Date of Seizure Was Not Entitled to the Benefits of the Convention Between Japan and the United States as the Same Was Executed June 1928.

A. Because Not Flying Japanese Flag or a Boat For Which Japan Assumed Responsibility.

A. Appellant relies in great measure on the case of *Cook v. United States,* 288 U. S. 102, construing the treaty of May, 1924, with Great Britain. It is true that the treaty of the United States with Japan is very much like the above mentioned treaty with Great Britain. The

facts in this case differ. It should be particularly noted in this connection, Art. 11, Sec. 1 of said treaty, refers only to *private vessels unde rthe Japanese flag.* (46 *Stat.* 2446, 2449.) At no stage of this case has it ever been contended that the vessel "Patricia" was under the Japanese flag. (R. 123-125.) (R. 56.) Counsel for appellant has contented himself with an effort to convince this Honorable Court that because the owner of the ship was a Japanese, the nationality of the ship likewise was Japanese and therefore within the treaty. This is not sufficient. In support thereof we cite the following provisions of the law of Japan with reference to the right of a Japanese vessel to fly the Japanese flag. Under the Japanese law on said subject under date of December 22, 1930, the following appears:

"JAPAN

"(Translation.) December 22nd, 1930.

A. Granting of the Right to fly the National Flag.—Only Japanese vessels may fly the Japanese flag (Article 2 of the Shipping Law).

Japanese vessels may only fly the Japanese flag or navigate at sea after being provided with the nationality certificate or the provisional nationality certificate, without prejudice to special provisions of laws and decrees (Article 6 of the same law).

* * * * * * * *

(I) Nationality and Domicile of the Owner (Nationality and Registered Offices in the Case of Companies).—The following are recognized as Japanese vessels:

(1) Vessels belonging to Japanese governmental or official authorities;

(2) Vessels belonging to Japanese subjects;

(3) Vessels belonging to commercial companies having their registered offices in Japan, provided that all the partners in the case of general partnerships, all the partners whose responsibility is limited in the case of commandite companies and commandite joint-stock companies, and all the directors of joint-stock companies, are Japanese subjects;

(4) Vessels belonging to corporations having their registered offices in Japan, whose representatives are all Japanese subjects.

* * * * * * * *

(III) Registration and Tonnage Measurement.—The owner of the Japanese vessel must fix the home port in Japan and must apply to the competent maritime authorities having jurisdiction over that home port to measure the tonnage of the vessel.

Before a vessel acquired in a foreign country can navigate between foreign ports, the owner of the vessel may have the tonnage measured by the Japanese consul or commercial agent (Article 4 of the Shipping Law).

The owner of the Japanese vessel must, after having it entered, apply for its registration in the shipping register kept by the competent maritime authorities having jurisdiction over the home port.

When the registration referred to in the preceding paragraph has been effected, the competent maritime authorities shall issue the nationality certificate (Article 5 of the same law).

* * * * * * * *

B. Authorities at Home and Abroad Competent to issue Nationality Certificates: Conditions under

which the Issue is Effected.—The owner of a Japanese vessel must, after having the vessel entered, apply for its registration in the shipping register kept by the competent maritime authorities having jurisdiction over the home port.

When this registration has been effected, the competent maritime authorities must issue the nationality certificate (Article 5 of the Shipping Law).

* * * * * * * *

Persons who have acquired vessels abroad may ask for a provisional nationality certificate at the place of acquisition.

* * * * * * * *

C. Nature of the Nationality Certificates Issued by the Competent Shipping Authorities Abroad.—The period of validity of the provisional nationality certificate issued abroad may not exceed one year.

* * * * * * * *

(I) Fixing of the Vessel's Home Port.—The owner of a Japanese vessel must fix the home port in Japan and have the tonnage measured by the competent shipping authorities having jurisdiction over the home port (Article 4, paragraph 1, of the Shipping Law).

* * * * * * * *"

The above quotation is taken from a League of Nations document entitled "Comparative Study of National Laws Governing the Granting of the Right to Fly a Merchant Flag," dated April 20, 1931, giving a translation of the laws of Japan pertaining to the subject.

As we have earlier stated, the burden of proof falls upon the claimant in such a case as this once the Gov-

ernment has shown probable cause for the seizure. In the instant case the claimant has failed entirely to show that the vessel "Patricia" was entitled to fly the Japanese flag although owned by a Japanese citizen. Claimant has failed to show that the vessel ever obtained or even applied for a nationality certificate or the provisional nationality certificate made requisite by the laws of Japan to enable Japanese vessels to fly the Japanese flag. It necessarily follows therefrom and from the evidence before the Court herein that the "Patricia" in the instant case was not entitled to fly the Japanese flag, and consequently claimant cannot avail himself of the protection of the treaty with Japan of May 31, 1928.

This fact distinguishes clearly the instant case from that of *Cook v. United States*, 288 U. S. 102. In that case the motor screw "Mazel Rov" was alleged to be of British registry and owned by a Nova Scotian corporation. That is a different situation entirely from the facts in the instant case. Consequently the said case is not at all controlling here. On the other hand, as stated in Point 2, under the authority of United States law Section 581 of the *Tariff Act of 1930* (19 *United States Code*, Section 1581), the vessel in question was subject to being boarded by the United States Coast Guard, searched and seized, as was done in this case.

There should be no question of the duty of an alien living in the confines of a nation other than his own to observe the laws of the country in which he lives and of his being subject to their laws. In this connection may we respectfully quote to the Court the following authorities in support of said statement?

Wheaton, "Elements of International Law," Sec. 101, relative to the distinction between private and public vessels, reads as follows:

> "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such individuals did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects then, passing into foreign countries, are not employed by him nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption."

Moore's International Law Digest, Volume 4, page 11:

> "Every foreigner born, residing in a country, owes to that country allegiance and obedience to its laws as long as he remains in it, as a duty imposed upon him by the mere fact of his residence, and the temporary protection which he enjoys and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states and nowhere a more established doctrine than in this country." (Mr. Webster, Secretary of State, Report to the President, December 23, 1931.)

Same volume, page 13:

> "Every person who voluntarily brings himself within the jurisdiction of the country, whether permanently or temporarily, is subject to the operation of its laws, whether he be a citizen or a mere resident, so long as, in the case of the alien resident, no treaty stipulation or principle of international law is contravened." (Mr. Blaine, Secretary of State, to Mr. O'Connor, November 25, 1881.)

Hyde's "International Law Chiefly as Interpreted and Applied by the United States," page 465, Vol. I:

> "His (the alien's) relation to the territorial sovereign as a resident within its domain does not appear to differ from that of the national; it is essentially domestic."

Borchard's "Diplomatic Protection of Citizens Abroad," page 349:

> "The foreigner in entering a country tacitly undertakes to accept the laws and institutions which the inhabitants of the country find suitable to themselves. By becoming a resident, he undertakes the obligation of obedience to the laws, and assumes a certain relationship to the state of residence which has been popularly characterized as 'temporary allegiance.' "

Same volume, page 92:

> "In international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as those possessed by and imposed upon the citizens of that country. * * * The domiciled

alien owes to the state of his residence practically all the duties of the native except such as have a political character; * * *."

Same volume, page 94:

"In return for the protection of person and property which, by municipal law and treaty, the country of residence assures to the alien, he owes obedience to the local law or what has been called temporary allegiance to the state."

Upon the foregoing authorities we respectfully contend that the facts in the instant case show clearly that the vessel was seized inside the twelve mile limit or four leagues from the coast.

An examination of an earlier treaty with Japan, of February 21, 1911, found in 37 *Stat.* 1504, gives added strength to the Government's contention that not only has the claimant failed to accept the burden of proof, bringing the "Patricia" within the terms of the convention of 1928, but that it affirmatively appears said "Patricia" was not within the terms of that convention.

This appears to be a "Treaty of Commerce and Navigation Between the United States and Japan." Article IV of said Treaty provides as follows:

"There shall be between the territories of the two High Contracting Parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the Contracting Parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be opened to

foreign commerce, *subject always to the laws of the country to which they thus come.*" (Italics ours.)

On the question of the nationality of the vessel "Patricia," Article 7 of the Treaty of February 21, 1911, just cited, further shows the understanding between the United States and Japan as to what may be considered vessels of said countries. Said Article X is as follows:

> "Merchant vessels navigating under the flag of the United States or that of Japan and carrying the papers required by their national laws to prove their nationality shall in Japan and in the United States be deemed to be vessels of the United States or of Japan, respectively."

We desire to quote the pertinent provisions of Section 581 of the *Tariff Act of 1930,* referred to in Point 2 of this brief:

> "* * * at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle, is liable to forfeiture, it shall be the duty

> of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation." (Section 581 of the Tariff Act of 1930; Title 19 United States Code, Section 1581.)

This law of the United States clearly authorizes the seizure in the instant case.

We further point out that this is recognized by the United States Supreme Court in the *Cook* case in view of their statement, at page 120 in said case, referring to Section 581 of the *Tariff Act of 1930:*

> "The section continued to apply to the boarding, search and seizure of all vessels of all countries with which we had no relevant treaties. It continued also, in the enforcement of our customs laws not related to the prohibition of alcoholic liquors, to govern the boarding of vessels of those countries with which we had entered into treaties like that with Great Britain."

Clearly then the vessel "Patricia" not being within the provisions of the Treaty with Japan of May 31, 1928, because it did not fly the Japanese flag and was not entitled to do so, is subject to the laws of the United States and particularly the law just cited authorizing the seizure of the vessel within four leagues of the coast of the United States.

If the treaty of May 31, 1928, had used the terms "Japanese vessels" or "vessels owned by citizens of Japan" instead of the terms that it does use, i.e., "private vessels under the Japanese flag" there might be some merit to the contention of the claimant herein that he was

entitled to the benefits of said treaty, but it seems most apparent that the High Contracting Parties, in the said treaty, intended to and did, by said treaty, seek to protect and refer to only that type of private vessel that was "under the Japanese flag."

This construction of said treaty is made more apparent when we consider the other treaty between the United States and Japan, previously referred to as the treaty of February 21, 1911, wherein the High Contracting Parties specified, in Article X, what vessels were to be deemed to be vessels of the United States and of Japan, respectively, and stated in that regard that such vessels shall be understood to be—

> "Merchant vessels navigating under the flag of the United States or that of Japan *and carrying the papers required by their national laws to prove their nationality* * * *." (Italics ours.)

May we add one further observation? We respectfully point out to the Court that the territorial limits of three miles from the coast are not controlling in the instant case because of Section 581 of the *Tariff Act of 1930* (19 *U. S. Code*, Section 1581) authorizing the boarding, search and seizure of vessels outside the three mile limit and within four leagues of the coast.

The Supreme Court in the *Cook* case recognized that fact when it stated, on page 113, the following:

> "In the effort to prevent such violations British vessels were being boarded, searched and seized beyond the three-mile limit; and by Par. 581 of the Tariff Act of 1922 Congress undertook to sanction

> such action through enlarging the authority to board, search and seize beyond the three-mile limit so as to include foreign vessels although not inbound."

The recognition of this fact by the decision in the *Cook* case, coupled with their statement above quoted on page 120, that—

> "The section continued to apply to the boarding, search and seizure of all vessels of all countries with which we had no relevant treaties,"

clearly, in our opinion, disposes of the instant case as there is no relevant treaty of which the "Patricia" may avail itself since the said vessel does not come within the terms of the treaty of May 31, 1928 (46 *Stat.* 2446) as said treaty is limited, by its own terms, to "private vessels under the Japanese flag."

Furthermore, we feel we should again point out that the treaty in question goes no further than to state that—

> "The Japanese Government agree that they will raise no objection to the boarding * * * outside the limits of territorial waters by the authorities of the United States, * * *" (Section 1, Article II.)

The treaty further provides, in Section 2, of Article II:

> "If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions, prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions, for adjudication in accordance with such laws."

Section 3 of Article II provides in part:

> "The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions, than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. * * *"

The terms of said treaty clearly comprehend the right given by the Japanese Government to the authorities of the United States to enforce its laws outside the territorial limits of the United States three miles as to "private vessels under the Japanese flag" and as to such by said treaty the Japanese Government agree that they will raise no objection.

We have here a situation where the "Patricia" is not such a vessel as is comprehended within the terms of said treaty nor do we have the slightest indication of objection to this seizure by the Japanese Government. This case has been so long pending and the matter has come to the knowledge of the Japanese authorities, as is evidenced by the appearance in this Court of the Japanese Consul, that if the Government of Japan was interested in the matter abundant opportunities have been presented them for any representation by said Government in this case. This we hold to be a further indication that the vessel "Patricia" is not within the terms of the treaty in question.

We wish further to point out in connection with our quotation above, from page 113, in the *Cook* case, the cases cited by the Supreme Court in Note 7 on said page concerning the boarding, searching and seizing of vessels beyond the three mile limit, and in particular refer to the

case of *The Island Home,* 13 F. (2d) 382, a decision of the Circuit Courts of Appeals for the Fifth Circuit, wherein the said Court clearly holds that the United States has jurisdiction over marginal sea to at least four leagues for the purpose of enforcing the revenue and customs laws and that a foreign ship, arriving within convenient distance from the coast so that cargo could be introduced by use of small boats, was held within the jurisdiction of the United States and required to observe all the customs laws and regulations and that under the Tariff Act of September 21, 1922, Section 581, the Coast Guard, observing a foreign ship at anchor had authority to board her for inquiry as to cargo and destination and finding no manifest, had the right to search without warrant.

Assuming, without admitting, that the vessel "Patricia" was a foreign ship, the boarding of her within the four league limit and failure of her master to produce a manifest, and the finding of the large cargo of intoxicating liquors aboard, would clearly seem, under the decision just mentioned and the other relevant decisions heretofore cited, to amply establish probable cause for the Coast Guard to seize the vessel. As we have previously stated, where probable cause is shown, the burden of proof under Section 615 of the *Tariff Act* (Title 19, *U. S. Code,* Section 1615) is placed upon the vessel or her claimant to show her innocence. We respectfully contend same has not been shown in this case.

B. It Affirmatively Appears That the "Patricia" Was Engaged in the Coasting Trade and Therefore Specifically Excluded From the Convention Between Japan and the United States, of 1928.

Article XIII of that convention, in part, provides:

> "the coasting trade of the High Contracting Parties is excepted from the provisions of the present treaty and shall be regulated according to the laws of the United States and Japan respectively * * *."

The evidence adduced overwhelmingly indicates that the "Patricia" was engaged in the coasting trade on the western coast of the United States. The claimant and appellant, Tomikawa, testified in substance that he purchased the "Patricia" at San Pedro and that he bought it for the purpose of capturing sardines; that he sent it to Ensenada and back to San Pedro and made a trip to San Diego to procure nets (R. 266). At the time the ship was hailed it had the name "Patricia" in its bow and its home port was designated by the word "Los Angeles" on its stern (R. 79). We have just quoted from the testimony of the witness Dwight, who was in charge of the Coast Guard which captured the "Patricia" the date she was apprehended.

Further, claimant and appellant herein testified that he had made his living fishing since coming to this country in 1919; that he had never done anything else; that he went to Japan for a short time in 1928, returning in 1929, and upon his return immediately reentered the fishing business for himself. He claimed it was the only business he had been in since that time. He further tes-

tified to tying up his ship for a few months because of orders from the cannery that they could not use any fish at that time. (R. 265, 266.)

The above excerpts from the testimony of the witness just quoted prove conclusively we respectfully submit that the boat "Patricia" was purchased for the fishing trade, was used in such trade and therefore came within the exceptions of Par. XIII hereinabove set forth.

We turn now to a consideration of the pertinent incidental questions raised by appellant. The designation "incidental" is applied because if this Honorable Court agrees with our contention that the "Patricia" was not within the convention between Japan and the United States, further consideration of other points urged becomes unnecessary. This by inference, is concurred in by claimant at page 4 of his brief.

We have already specifically denied the contentions of appellant's Points 1 to 6. Likewise we have covered appellant's Points 12 and 13.

Replying to Point 7 (Appellant's brief 52) that the libel did not affirmatively allege the boat was within one hour's sailing distance from the coast, we have merely to allege and prove the boat was within four leagues sailing distance of the coast, and that the burden of proof then shifted to the claimant.

Point 8. Answering Point 8 it is not our contention that the "Patricia" was a vessel of the United States, nor do we deny that she was an alien vessel within the meaning of the Customs Laws levying light money. What we do say is that the vessel "Patricia" was not within the terms of the convention between Japan and

the United States. That being so she was subject to being boarded within four leagues of the coast.

> "The section continues to apply to the boarding, search and seizure of all vessels of a country with which we had no relevant treaties."
>
> *Cook v. United States,* 288 U. S. at 120.

Points 9, 10, 11, and 13 have already been covered.

Points 14, 15, 16, 17 and 18 refer to the jurisdiction of the court over the cargo of liquor found on the "Patricia" at the time of seizure. At the time of the special appearance of the claimant at the time the proclamation was read, to-wit: on the 28th of April, 1932, he made no claim in that petition as to the ownership of the cargo (R. 31-37 at 34).

Furthermore, after the special appearance of the claimant had been entered on motion of the United States Attorney, default of all parties not appearing was entered (R. 40). Examination of the record indicates that the libel of information was against the ship, tackle (and cargo). However, the return of the monition on the 28th of April, 1932, showed that the Marshal only attached the "Patricia" (R. 14). We submit that from the foregoing statement in no event was claimant damaged by the order of court dismissing the libel, and the decree pursuant thereto which was signed on the 29th of June, 1933, and later vacated, which decree directed the return of the cargo to the claimant. This is true because either the court did not have jurisdiction of the cargo because it was not attached by the Marshal (and we so contend), or if the court did have jurisdiction, default of

said cargo was ordered at the time the proclamation was read following the appearance of the claimant, at which time he did not lay claim to the cargo.

Counsel has laid great stress on these points about the deprivation of his civil rights and his being misled to not laying claim for the cargo by virtue of the fact that it was named in the libel. We take issue with that assertion. An examination of claimant's Exhibit "A" (R. 258) indicates the reason for his failure to claim the cargo. (R. 259.) The court will take judicial notice of the fact that at the time claimant appeared in court he was under indictment, as set forth in Exhibit "A" just referred to, for violation of the National Prohibition Act and the Customs Laws, growing out of the presence of the cargo in question upon the "Patricia" the date of its seizure. It was only after that indictment was quashed, April 24, 1933, that claimant sought to lay claim to the cargo. These contentions are borne out by claimant's own testimony when he testified as late as August 7, 1934, that the cargo was not his; that it had been placed on his boat against his will by a ship which he said was in distress and whose Complement instructed him that they would be back for it the next night (R. 269, 271).

It is elementary that a court has no power over a person or thing which is never properly before it. We submit that since the Marshal did not attach the cargo, as shown by his return, that the cargo was never before the court. We further contend that the action of the Collector of Customs in proceeding against said cargo under the provision of Section 607 of the *Tariff Act of 1930*

was entirely proper and in accordance with law (See testimony of Deputy Collector, R. 228, 231).

It will be observed from an examination of the pages just referred to that this liquor was proceeded against as authorized by the Tariff laws during the month of August, 1932, which was *after* claimant had appeared in court on the day the proclamation was read, and at which time he made no claim for the cargo. It was also previous to the time that the order denying defendant's motion to quash the criminal charge was re-opened which was April, 1933.

With reference to appellant's Point 19, wherein it is claimed that the court in deciding this point should have taken judicial notice of the judgment quashing the indictment of the criminal action, an examination of claimant's Exhibit "A" for identification, previously referred to (R. 259) shows that the indictment was subsequently quashed after arguments and preliminary ruling dismissing the libel in this present proceeding, so that while it is elementary that disposition of a criminal charge will not dispose of civil matters such as forfeiture and/or taxes for violations of the Customs Laws, in addition it appears that the motion to quash was partially based on an order of the court which was thereafter set aside. The same argument applies to Point 20.

In reference to Point 21, wherein claimant objects to the introduction of evidence tending to prove that the vessel "Patricia" was subject to forfeiture for the additional reason that it was a Japanese owned boat in which there had been a break in the title, we respectfully submit that there is no irregularity in the taking of this

testimony because it is properly within the authority of the court after an order vacating decree has been entered. Nor is this evidence immaterial because the amended libel charges violation of the laws of the United States. (R. 25.) Claimant does not refute libelant's contention that the break in the chain of title as here disclosed subjects vessel to forfeiture.

Point 22 is based on the erroneous supposition that the cargo was being adjudicated by this proceeding. We have previously pointed out that either the cargo was never before the court by virtue of the Marshal not having attached it, or if it was before the court its default was entered at the time the proclamation was read and no motion to set aside such default was ever made.

May we not herein point out the exact statute under which the Collector of Customs was authorized to dispose of the cargo here in question, independent of court action?

The *Tariff Act of 1930*, and particularly these sections which may be herein designated as Sections 1605 and 1607 of Title 19, provide as follows:

> "1605. All vessels, vehicles, merchandise, and baggage seized under the provisions of the customs laws, or laws relating to the navigation, registering, enrolling or licensing, or entry or clearance, of vessels, unless otherwise provided by law, shall be placed and remain in the custody of the collector for the district in which the seizure was made to await disposition according to law."

Section 1607 provides:

> "If such value of such vessel, vehicle, merchandise, or baggage returned by the appraiser, does not

exceed $1,000, the collector shall cause a notice of the seizure of such articles and the intention to forfeit and sell the same to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. For the purposes of this section and sections 1610 and 1612 of this chapter merchandise, the importation of which is prohibited, shall be held not to exceed $1,000 in value."

The court will take judicial notice of the fact that importation of the cargo of liquor in question was clearly prohibited under the laws of the United States which were then in force, to-wit: on March, 1932.

The testimony of Chief Deputy Collector of Customs Salter adduced that the cargo of liquor in question was disposed of under the provisions of the sections just quoted. (R. 235.)

Responding to Point 23 of appellant may we point out that it directly contradicts his Point 18. Point 18 he asserts because the libel included the cargo, the appellant relied thereon and gave up important legal rights. Thereby, he alleges, fraud was perpetrated on appellant. Point 23 claims that appellant was excused from filing a claim for the cargo because he was then under indictment and asserts that the answer was treated as a claim. By a statement in point 23 to the effect that appellant was excused from filing a claim because he was then under indictment appellant reveals that it was no error on his part which caused him to omit from his claim and motion to quash an allegation as to his alleged ownership of the cargo. From that statement in Point 23

it is likewise apparent that it was no error or misapprehension of the state of the record which caused claimant to fail to include the claim for the cargo in his answer. The court will note that that answer was filed on October 17, 1932 (R. 22), some seven months after the proclamation was read. It will be recalled we have previously pointed out no claim for the cargo was included at the time claimant made his special appearance, i.e., the date of the reading of the proclamation. It will likewise be recalled that the return on the monition dated April 28, 1932, showed that only the ship was attached. In view of the assertion here made in Point 23 appellant was excused from filing a claim because he was then under indictment can we not but conclude that claimant was conscious at all times hereinbefore referred to that he was not asking for an adjudication of any rights to the cargo.

Responding to Point 24 wherein claimant asserts that the finding to the effect that the cargo did not come within the jurisdiction of the court was erroneous we have but this observation. We have previously contended that it was through inadvertence the cargo was sought to be libeled in the libel of information. The finding in question was made in support of the record revealed by the return of the monition thus reconciling the libel of information with the return of the monition.

Responding to Point 25 we point out that there is no inconsistency as contended by claimant of the finding the cargo did not come within the jurisdiction as against the finding the lower court had jurisdiction of this proceeding. It is borne out by the fact that the return of the monition distinctly shows that the boat, tackle and equip-

ment which is herein adjudicated was attached by the Marshal whereas the cargo was not.

Before discussing Point 26 may we again re-emphasize the misapprehension under which claimant has proceeded throughout this brief in his assumption that it is the duty of the government and libelant to exclude the "Patricia" from the provisions of the convention between Japan and the United States. Whereas as a matter of law, when probable cause is shown, as alleged in the libel of information seeking the forfeiture, the burden then shifts to the claimant to excuse himself from the operations of the Customs Laws. We therefore take this opportunity of quoting portions of the leading cases on the point.

The *John Griffin*, 82 U. S. p. 29. This case is for decree of forfeiture against the bark *John Griffin* for the illegal smuggling of cigars into this country from Cuba. Decree of forfeiture was granted by the District Court which was reversed by the Circuit Court and the United States Supreme Court reversed the Circuit Court and affirmed the District Court. The two acts there in question were in substance as follows: The prohibition was against unloading merchandise which had come from a foreign port after nightfall. That statute after directing how seizure should be made provided "That in actions, suits, or informations to be brought where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case the onus probandi shall be upon the claimant." That the libel was filed against the bark, claim was filed as owned by one Downey and others. Testimony showed that Downey

was Master and part owner of the vessel. The cigars were seized after they had been unloaded in New York and the owner of the cigars was the principal witness for the government. He testified that the cigars were imported on the bark with the knowledge, consent and connivance of Downey. A letter was found in the owners' room from Downey to him dated at the port from which the owners said they had embarked for the United States, acknowledging receipt of the owners' merchandise without naming its contents but indicating Downey's anxiety over the undisguised appearance of the cargo. The court said in part:

> "The case as thus made amounts to something more than the probable cause, which, by section seventy-one of the act of 1799, throws the onus probandi on the claimant of the vessel. It is a clear prima facie case, and both by the statutes and the ordinary rules of evidence required of the claimant such testimony as should satisfactorily rebut the presumption of guilt which it raised."

The court then proceeded with a discussion of the attack made upon the principal witness for the government, as it had been contrasted against the testimony of Downey and though the government's witness' testimony had been partially impeached the court pointed out that the letter from Downey to the witness was in harmony with the witness' story.

In *United States v. Three Thousand Eight Hundred and Eighty Boxes, etc.* 12 Fed. 402, this case revolved around a claimant's assertion to title to certain merchandise after seizure of opium which was seized from a row

boat which just left the ship. At page 405 the court undertakes a review of the controlling decisions respecting the burden of proof which is cast on a claimant responding to a libel of information seeking forfeiture. The court first undertook an analysis of Section 909 of the Revised Statutes of the United States. This statute provides:

> "In suits or informations brought when any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person the burden of proof shall be upon such claimant; provided, that probable cause is shown for such prosecution, to be judged of by the court."

It will be observed that this section is in substance the same as Section 1615 of Title 19, enacted June 17, 1930 (This section superseded Section 525 of Title 19, which had been enacted September 21, 1922). For the sake of analysis may we now quote Section 1615:

> "In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: Provided, That *probable cause* shall be first shown for the institution of such suit or action, to be judged by the court." (Italics ours).

Returning to the court's analysis in the case now cited (12 Fed. at 405) the court took occasion to quote in *Locke v. U. S.* 7 Cranch, 339, Marshall, C. J., observes:

> "It is contended that probable cause means prima facie evidence, or, in other words, such evidence, as in the absence of excuplatory proof, would justify condemnation. This argument is very satisfactorily answered on the part of the United States by the observation that this would render the provision totally inoperative. It may be added that the term 'probable cause' according to its usual acceptation, means less than evidence which would justify condemnation, and in all cases of seizure has a fixed and well-known meaning. It implies a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress."

After commenting on the case of *John Griffin* which we have previously referred to the court then said:

> "There can, I think, be no doubt that a prima facie case for condemnation was made by the government, and that the onus probandi was thrown upon the claimant, and it became his duty 'to satisfactorily rebut the presumption of guilt which it raised.' This duty could only be discharged by the production of the best evidence of which the nature of the case admitted."

The court quoted from the case of *Clifton v. U. S.* 4 How. 247:

> " 'Under these circumstances the claimant was called upon by the strongest consideration, personal and legal, if innocent, to bring to the support of his

defence the very best evidence that was in his possession or under his control.' "

May we cite *Feathers of Wild Birds,* 267 Fed. 964 (footnote 3 Sec. 525 Title 19) wherein it is pointed out that probable cause as required by Section 1615, Title 19, under which this seizure was made is no more than present circumstances creating suspicion. Keeping in mind the fact that we have previously referred to the boat being heavily laden, no fishing nets visible, no flag, the name Los Angeles on its stern, proceeding in the direction of Los Angeles when cited, all of which were circumstances creating suspicion. We have taken this opportunity to further elaborate on the question of burden of proof because claimant's whole case is built up on the proposition that the government's evidence does not exclude the "Patricia" from the terms of the convention. Although we consistently contend that without it in any way being incumbent upon the government and libelant, the government's evidence does exclude the "Patricia" as has hereinbefore and will be hereafter more completely established.

We turn now to a consideration of Point 26 raised by appellant wherein he claims the finding that he was not entitled to fly the Japanese flag was without a scintilla of evidence. Counsel seems to have overlooked his stipulation and statement to the court wherein he stated in substance he would stipulate that this particular vessel was not registered, licensed or documented by the Japanese government. (R. 123).

May we again refer this court to the Japanese law under date of December 22, 1930, translation of which

is taken from the League of Nations documents dated April 20, 1931, entitled "Comparative Study of National Laws governing the Granting of the Right to fly a merchant flag." Following "A3 Granting of the Right to fly the National Flag—only Japanese vessels may fly the Japanese flag." (Art. 2 of the Shipping law) Japanese vessels may only fly the Japanese flag or navigate at sea after being provided with the nationality certificate or the provisional nationality certificate, without purejudice to special provisions of laws and decrees. (Article 6 of the same law).

Under C(1) of that document "Fixing the vessel's Home Port" the owner of a Japanese vessel must fix the home port in Japan and have the tonnage measured by the competent shipping authorities having jurisdiction over the same port (Article 4, paragraph 1, of the Shipping law.)"

Again at page 24 Mr. Schleimer admitted that outside of the registering of the vessel which was done at San Pedro by the Collector no other government or body had anything to do with numbering or enrolling or registering this particular vessel or libeling the same which admission was accepted by the court and counsel (R. 124, 125).

Furthermore, during the testimony of Kakichi Ozawa, (R. 126-132) he produced the official publication containing the registration of Japanese vessels, which publication revealed that the "Patricia" was not so registered. More particularly, in answer to re-cross examination by claimant's proctor the Vice Consul testified as follows:

> "This book contains all Japanese vessels registered in the Japanese ports regardless of the tonnage. You know, to be called Japanese ships, the ship must be registered at some Japanese port. A ship only owned by Japanese subjects does not mean Japanese vessels. This book does not contain vessels that are owned by Japanese in foreign countries. This book only contains vessels that have been registered, licensed and documented by the Government of Japan." (R. 149).

Any objection of the testimony and evidence just cited is overcome by claimant's own authorities page 94 of his brief, wherein he makes the statement the "flag" of a vessel and its "ownership" may be proved by parol or by any other competent evidence. Citations thereunder.

It should be borne in mind that evidence just cited was elicited by claimant's proctor in re-cross examination. That evidence, together with the stipulation of claimant's proctor hereinabove referred to and the shipping law above cited not only rebuts claimant's contention that there is not a scintilla of evidence to support the finding that the vessel "Patricia" was not entitled to fly the Japanese flag but rather overwhelmingly supports such finding.

Turning to Point 27 we must again remember that claimant is proceeding on the theory that the libelant instead of himself must prove that the "Patricia" is within the convention between Japan and the United States. Claimant asserts at Point 27 that the finding that appellant was not entitled to fly the Japanese flag is based on judicial knowledge because that was not pleaded or proved. We merely point out that certainly the libel-

ant did not plead that the appellant "Patricia" was not entitled to fly the Japanese flag because it is not a necessary allegation to a libel of information seeking forfeiture as we have previously pointed out.

The finding is made to that effect, despite the fact that it was not pleaded or proved, in order to show that the burden cast upon the defendant and which burden was set up by him in his affirmative defense to his answer had not been met.

Point 28 we have heretofore covered. The law of Japan together with the provisions of the treaty which lays down the requirements as to what shall be considered a Japanese vessel.

Point 29 restates claimant's earlier contention that the question whether or not the vessel "Patricia" was within the convention depends upon the owner's nationality irrespective of the flag she flies. We have seen from the testimony of the Vice Consul and an examination of the treaty that no such intention was expressed nor included in the terms of the treaty.

Point 30—responding to Point 30 wherein claimant and appellant states that the finding that the vessel was not registered in Japan did not affect her nationality because her nationality is nevertheless that of her owner, we have this reply. We are not here concerned with the nationality of the "Patricia." Our question is whether or not she was a private vessel within the meaning of the convention. We are not confronted with the question nor is this court called upon to decide what the nationality of the "Patricia" is. The question we contend is whether or not probable cause having been shown for

the seizure, has the claimant accepted the burden then thrust upon him in the law to establish the "Patricia" as being within the terms of the convention. In other words, has the claimant proven that the "Patricia" is a vessel entitled to fly the Japanese flag. To that end, has he proved that the "Patricia" has been registered or provisionally registered with the Japanese officials as required by Japanese law; has he shown that the claimant lists the "Patricia's" home port Japan? (The evidence shows from the Deputy Collector of Customs' testimony of the coast guard the vessel's home port is listed as Los Angeles on her stern, both of which points have been heretofore discussed.) Or has claimant even assuming but in no way admitting that he has assumed and sustained the burden that the "Patricia" is within the convention has the evidence not overwhelmingly shown that the "Patricia" was engaged in the coasting trade and therefore even if a Japanese vessel she is exempted from the convention by Article XIII of the convention which we have hereinbefore set forth and which is set forth at page 48 of claimant and appellant's brief.

Turning to Point 31 wherein claimant objects to the finding that appellant was domiciled in the United States and claims that there is not a scintilla of evidence to support such finding, we are constrained to point out claimant has not cited all of the testimony on that point. Claimant testified "I have been living at San Pedro, California, since May of 1919. Made my living since I came to the United States, fishing. I have been in the fishing business sometime for myself and sometime for others. I have been in the fishing business all my life.

Since I came to this country I do fishing and never do anything else." (R. 265).

Then follows a detailed description of the various boats owned partially or in their entirety by the claimant, all of which he testified were moored at San Pedro. He did testify that he left the country in December, 1928, but returned in May of 1929, when he again reentered the fishing business (R. 265).

Claimant testified that at all times he lived in the United States he lived at the same place, Terminal Island, at San Pedro. (R. 276). He further testified that he had been fishing more than fifteen years operating boats (R. 277). In response to a question he testified that he had not done any fishing when he lived in Japan because he was too young at that time; that he had only been in the fishing business since he had come to this country (R. 276).

We respectfully submit that no evidence could be more persuasive than the evidence just quoted to sustain the finding, it being based on claimant's own testimony he was domiciled in the United States. We again reiterate, however, that the question just discussed is immaterial to the issue whether or not probable cause having been shown for the forfeiture claimant assumed the burden of showing that the "Patricia" was not within the treaty between Japan and the Uinted States. We further point out that the treaty does not embrace vessels which are owned by subjects of Japan but those vessels which are entitled to fly the flag of Japan in which the Japanese government assumes responsibility. As we have seen again and again throughout this record the "Patricia" was not in that class.

Point 32. It is not contended that the finding that the appellant was domiciled in the United States affected his nationality. Nor we submit is this honorable court required under the issues to consider such a question.

Point 33. Turning to Point 33 wherein claimant asserts that libelant was estopped from disputing the nationality of the vessel because the Collector of Customs entered her as a foreign vessel. As we have pointed out before, it is only here contended that the claimant has not shown the "Patricia" was within the terms of the convention. But again, even assuming and in no way admitting it is the libelant's responsibility to exclude the "Patricia" from that convention, the registration by the Collector in no way affects the issue.

Claimant asserts, page 103 of his brief, that the undisputed evidence is to the effect that the Collector of Customs entered the vessel as a Japanese alien vessel. Before addressing ourselves to the argument may we point out in response to question as to what does the word "Jap" stand for, after the listing of the "Patricia" by name, together with its net tonnage—the Deputy Collector testified: "That means that is the nationality of the vessel *as we classify it.* I might add if it is an Austrian owned vessel, we class it as an Austrian vessel, Portuguese, Portuguese vessel." (R. 143). We immediately discern from the answer just quoted that the record is of no assistance with regard to the point here to be determined. The court is not asked to construe Customs law levying light money but rather to pass upon a decree of forfeiture on a boat which it has been found was within four leagues of the coast. There is no incon-

sistency in the fact that taxes are collected from an alien owned boat which makes its home port in America, and the interpretation of the treaty convention which exempts boats of a certain class, to-wit: private vessels which are enitled to fly the flag of Japan. As we have seen again and again, the "Patricia" was not entitled to fly the flag, because it is not registered as a Japanese boat by the Japanese authority, nor was its home port listed as Japan with the Japanese authorities or anyone else. Beyond all that it was engaged in the coasting trade and thus even if Japanese vessel in all other respects by virtue of its use is without the provisions of the treaty according to Article XIII.

Before leaving this point we wish to draw attention to the fact that claimant refers to findings and orders which were set aside by the order vacating a decree, and we respectfully submit such findings or such order is not before the court at this time inasmuch as claimant and appellant has appealed from the order vacating the decree.

Turning to Point 34 it is but a re-statement of Point 33. There is the same tendency to quote from findings and orders which have long since been vacated.

Turning to Point 35 wherein claimant asserts libelant was estopped from disputing the nationality of the vessel because of the judgment in the criminal action as we have previously pointed out claimant himself sets forth in two of his earlier points, 19 and 20, we have but to repeat the quashing of the indictment was made immediately subsequent to the order of the lower court in this action at the time it dismissed the libel, which order as

has been pointed out was vacated and thereafter the order and decree sustaining the libel entered.

It is from the last named decree that claimant is appealing.

Furthermore, answering Point 20, last paragraph, page 77, appellant and claimant's brief, wherein he states the judgment roll in the criminal action is merely offered in evidence of the fact in issue and not in bar to this proceeding. May we point out that the indictment in question was quashed long before the order setting aside the decree originally dismissing the libel. No motion was made upon the part of claimant and appellant to amend his answer.

Furthermore, since the indictment was quashed (after such motion had previously been denied) due to the fact that the lower court originally dismissed this libel, it is obvious that claimant was seeking to prove a fact the foundation of which had already been destroyed by the order vacating decree of dismissal of the libel in the instant action.

Referring to Point 36 wherein claimant states that the presence of the vessel within twelve miles of the coast did not justify her seizure because it was not a violation to there take bearings in a fog we have this observation to make. There is no merit in the point raised because an examination of Section 1581 of Title 19 immediately reveals that that section in authorizing the boarding of a ship within four leagues of the coast by Customs or Coast Guard is not confined to ships under way. To quote a brief portion of that section: "To examine the manifest and to inspect, search and examine the vessel or

vehicle and every part thereof and any person, trunk or baggage on board and to this end to hail and stop such vessel or vehicle which is *under way* and use all necessary force to compel compliance" * * *(Italics urse).

Referring to Point 37 wherein claimant contends that the possession of the cargo within 12 miles from the Coast did not justify the seizure because it was not engaging in trade, having transferred the cargo from a vessel in distress on the high seas, we make this observation. Claimant is assuming that the court accepted the testimony of the claimant. Claimant testified that his engines were not working well for that reason he had started back to San Pedro when he was already headed to San Diego (R. 267). Then he testified that after turning about, his engine stopped, while he was stopped the boat which he claims was in trouble, came alongside and forced him to take aboard this liquor (R. 270). He testified that this boat transferred this liquor two hours sailing distance before the coast guard seized him. (R. bottom 269). He then testified the boat which transferred the liquor told him to keep in the same place and he would be back that night and that he tried to keep in the same place. He did not run the engine, floated for a long time (R. 271).

In response to his counsel's question he testified that he did not come on back to where he was going, to-wit: San Pedro, because he was afraid of these people (R. 272). He testified on the occasion when he first came to the stand in May of 1932 as follows: "I did not have any financial interest in the 'Patricia'; not any. I work shares, after we get fish." (R. 62). When he was on

the stand August 7, 1934, on cross-examination in answer to the question "How much did he pay for the 'Patricia' he testified as follows: '$8,000.00.'" In answer to the question did he pay cash for that he answered "Yes sir" (R. 283). From the excerpts of the testimony of the claimant just quoted, we respectfully submit that the court below was amply justified in rejecting the testimony of the claimant regarding the presence of the liquor on his ship. The court on the other hand had the testimony of the coast guard officials as to the Patricia being well loaded, its failure to stop after being hailed until the Coast Guard drew alongside, the absence of any fishing nets on or about the boat, the same had the appearance of a fishing craft.

Point 38 wherein claimant contends that failure to produce a manifest is not a violation because demand was made beyond government's jurisdiction and the vessel was not bound to the United States, we have this observation to make. As we pointed out, from excerpts of claimant's testimony just quoted he was headed back to San Pedro. The Coast Guard officials stated that she was headed straight up the coast, northwest, when they came up behind her stern she had the letters "L. A." her home port and was headed in that direction. Counsel's citation, at page 111 of his brief, *in re United States v. 1,197 Sacks of Intoxicating Liquors,* 47 F. (2d) 284, refers to a boat which was in distress transferring a cargo to another ship. Claimant is again proceeding on the theory that the court accepted the evidence given by the claimant.

Point 39 claimant states that finding that the vessel was seized within four leagues from the Coast of the

United States is against Libelant's own evidence. Replying to that contention claimant confuses the testimony of the Coast Guardsmen as to his position when he first sighted the "Patricia" as compared with his position when he encountered the "Patricia." His testimony is as follows as to his position when he encountered the "Patricia." "I figured that I was 10 miles from San Juan point, 204 degrees true when I encountered the Patricia. I have a note of that here. * * * The nearest point of land is San Juan point." (R. 77).

Contradicting that testimony we have only the testimony of the claimant which we have had occasion to point out, the court was well justified in disregarding. Mathematical computation we find that computing a nautical mile at 6080 feet, ten such miles equal 60,800 feet. This latter figure when divided by 5280 feet (the number of feet in an English mile) equals 11.51 English miles. This clearly places the "Patricia" at the time of her encounter with the Coast Guard within the four leagues specified in Section 1581, Title 19, *USCA*.

Point 40 refers again to the power of the Collector of Customs to destroy the cargo. We have previously covered this point in our reply to points 22, 23, 24 and 25 claimant's brief.

Point 41 is merely a statement of elementary law, to-wit: a person is entitled to his property when unlawfully seized. It is here contended that there is no unlawful seizure and that is the point in issue.

Point 42 wherein the claimant asserts that in the event of a reversal the court should appoint a commissioner or Assessor to hear and report the damages sustained,

merely causes us to reassert that the treaty provides the respective High Contracting Parties shall each appoint a commissioner to adjust damages accruing from violation of such treaty.

Responding to Point 43, wherein claimant contends that the decree if sustained will subject the government to a refund of over fifty million dollars light money. We respectfully submit that claimant and appellant's apprehension and concern are unfounded. As we have previously pointed out the court is not here called upon to construe the Customs laws regarding the levying of duties and light money taxes. That comes within the power of Congress. What we are concerned with is whether or not the government having shown probable cause for the forfeiture herein sought, did the claimant accept the burden then imposed upon him by law and to that end brought himself within the treaty executed between Japan and the United States. A careful examination of those portions of the treaty cited by claimant himself indicates that the Contracting Parties to the convention between the countries did not understand themselves to be including all ships of both countries. As we have previously pointed out Article XIII recites that the coasting trade, is excepted from the Convention by the High Contracting parties.

We immediately conclude that there are or maybe those ships in the coasting trade on foreign shores of the Parties which might otherwise be in the treaty were it not for the exception. It is immediately apparent therefore that if this case is sustained it will in no way invoke the harsh burdens on the government predicted by

claimant's proctor. We have stated again and again and we repeat it is not contended that the "Patricia" is an American ship.

Point 44 refers to refusal to rule separately on appellant's request to find. We submit this is a moot point because it is covered by claimant's exceptions and objections to the findings and conclusions which were signed by this court from which signing and the decree based thereon he now appeals.

Passing to Point 46 wherein claimant raises a point regarding admiralty rule 1, we pass this without discussion because at page 127 of his brief claimant states this point is not involved in the instant case and we do not wish to burden the court unduly.

Conclusions.

It is respectfully submitted that the decree appealed from should be affirmed because the seizure in question was made within four leagues of the coast on probable cause, in that she was heavily laden, headed toward Los Angeles, Los Angeles was printed on her stern, there were no fishing nets discernible, and when hailed and boarded she had no manifest and that probable cause being shown not only did the claimant and appellant fail to assume and acquire the burden imposed upon him by law and to that end bring the "Patricia" within the terms of the convention between Japan and the United States, but if affirmatively appears notwithstanding his failure so to do that the "Patricia" was not within the class of vessels included in that convention.

We further submit that appellee should have the costs of appeal as herein incurred and such other and further relief as to the court may seem proper.

PEIRSON M. HALL,
United States Attorney.

By J. J. IRWIN,
Assistant U. S. Attorney.

Proctors for Appellee.

No. 7768

United States

Circuit Court of Appeals

For the Ninth Circuit.

KEMP-BOOTH COMPANY, LIMITED,
a Corporation,

Appellant,

vs.

J. M. GALVIN, as Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

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NAMES AND ADDRESSES OF COUNSEL

MESSRS. RIDDELL & BRACKETT,
Solicitors for Appellant,
1121 Smith Tower,
Seattle, Washington.

MR. EARL G. RICE,
Solicitor for Appellee,
1012 Lowman, Bldg.,
Seattle, Washington.

MESSRS. McCLURE & McCLURE,
Solicitors for Appellee,
905 Lowman Bldg.,
Seattle, Washington. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity. No. 939.

J. M. GALVIN, as Trustee in Bankruptcy of the House of Irving, a corporation, Bankrupt,

Plaintiff,

vs.

KEMP-BOOTH COMPANY, LIMITED, a Corporation,

Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the United States District Court for the Western District of Washington:

J. M. Galvin, a resident of King County in the Western District of Washington, and a citizen of the state of Washington, brings this, his bill of complaint, against Kemp-Booth Company, Limited, a corporation, and complains as follows:

I.

This is a suit in equity brought by the plaintiff as Trustee in Bankruptcy of House of Irving, a corporation, under and by virtue of the provisions of the Bankruptcy Act of 1898 and amendments thereof, to recover a preference under Section 60-b of the Act.

II.

At all the times herein mentioned House of Irving was and is a Washington corporation, and defendant was and is a Washington corporation with its principal place of business in Seattle in King County.

III.

On April 11, 1932, House of Irving, a corporation, was [2] adjudicated bankrupt by order that day duly entered in bankruptcy cause No. 32348 by the United States District Court for the Western District of Washington, sitting at Seattle, on involuntary bankruptcy petition filed March 25, 1932, by creditors against House of Irving. On May 2, 1932, plaintiff was duly appointed Trustee of the bankrupt and ever since has been and now is such Trustee, duly qualified and acting.

IV.

Within four months prior to March 25, 1932, and while the bankrupt was insolvent, and was indebted to the defendant and to other creditors of the same class on unsecured debts provable in bankruptcy, the bankrupt paid to the defendant in money the sum of $800.00, and assigned and transferred to the defendant certain accounts receivable of the approximate value of $2694.25, the same being part of the bankrupt's property; the defendant has ever since retained the same in its possession and under its control and has collected money on said accounts and is continuing to collect moneys

thereon from the respective debtors of the bankrupt whose accounts were so assigned; the amounts collected by the defendant are not definitely known to the plaintiff, but defendant is fully informed as to the same.

Also within the time and under the conditions hereinbefore mentioned the bankrupt made a further transfer of portions of its property to the defendant by delivery to the defendant during the months of January and February, 1932, of certain merchandise consisting of woolen suitings of the approximate value of $3500.00, the particular description of which are not now definitely known to the plaintiff, but the defendant has full knowledge thereof; and the defendant, ever since then, has exercised dominion over said merchandise, asserted title thereto [3] and sold part of the same.

V.

That each and every of said payments of money, assignments of accounts receivable and transfer and delivery of merchandise was made by the bankrupt to be applied and was by the defendant applied upon the defendant's claim against the bankrupt, which was thereby paid in full. That the effect of such cash payments and transfers by the bankrupt to the defendant was and is an appropriation of the assets of the bankrupt and a depletion of the insolvent fund, and was made so as to enable the defendant to obtain a greater percentage of its debt than any other creditor of the bankrupt of the same class as the defendant, and such transfers were and are each

a preference under the Bankruptcy Act of 1898 and the amendments thereto.

VI.

Defendant received such payments and transfers, knowing, or having reasonable cause to believe, that said bankrupt was insolvent and that it was receiving a preference under the Bankruptcy Act and the Laws of the state of Washington.

VII.

Plaintiff has insufficient assets in his hands to pay in full the indebtedness of the bankrupt, nor any more than approximately 10% of the amount of the claims of the general creditors, which aggregate about $17,000.00.

VIII.

Heretofore and prior to the commencement of this action plaintiff duly demanded of defendant the restitution and return to the estate in bankruptcy of the money and property preferentially transferred as above alleged, but the same has been refused. [4]

WHEREFORE plaintiff prays:

1. That the payments and transfers above mentioned be decreed by this court to be each preferential and in violation of the Bankruptcy Act of 1898 and the amendments thereto; that the same be set aside and be declared to be wholly void as against the plaintiff.

2. That the defendant be ordered to account for and to pay to the plaintiff the aggregate of all sums received from the bankrupt in money as well as all sums received by the defendant for collection of the accounts receivable above mentioned with interest thereon from date of defendant's receipt of same.

3. That the defendant be ordered to transfer to the plaintiff all of said assigned accounts receivable remaining in defendant's possession and under its control which have not been paid in full by the respective debtors.

4. That the defendant be ordered to account for and re-deliver to the plaintiff all of the merchandise remaining in its possession and under its control received from the bankrupt as above alleged, and as to such of the merchandise as may have been disposed of by the defendant that the plaintiff have judgment against the defendant for the value thereof.

5. That the plaintiff have such other and further relief as may be proper.

6. And may it please this Honorable Court to issue its subpoena directed to the defendant commanding it on a day certain to appear and answer this bill of complaint and to abide by the orders and decrees of the court thereon.

EARL G. RICE and
McCLURE & McCLURE,
Solicitors for Plaintiff,
1012 Lowman Building,
Seattle, Washington. [5]

State of Washington,
County of King—ss:

J. M. GALVIN, having been duly sworn, on oath states: He is the plaintiff above named. He has read the foregoing Bill of Complaint, knows the contents thereof and believes the same to be true.

J. M. GALVIN.

SUBSCRIBED and sworn to before me this 5th day of July, 1932.

[Seal] CARL G. RICE,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed July 8, 1932. [6]

[Title of Court and Cause.]

ANSWER.

Comes now Kemp-Booth Company Limited, a corporation, and answering plaintiff's complaint herein, admits, denies and alleges as follows:

I.

Defendant admits the allegations set forth in paragraphs I, II and III of plaintiff's complaint.

II.

Answering paragraph IV. defendant admits that within four months prior to March 25, 1932, and while bankrupt was indebted to the defendant, the

bankrupt paid to defendant in money the sum of $200.00 and in addition thereto did pay to the defendant the further sum of $100.00, for which a present consideration was paid, towit, $100.00 as an advance for the payment by bankrupt on account of a trade acceptance.

Defendant further admits that during said period, the bankrupt did assign and transfer to defendant certain accounts receivable of the approximate value of $2694.25, but denies that the said accounts were the property of the bankrupt or formed a part of his estate; admits that the defendant has ever since retained the said accounts and has collected and [7] is still collecting on the same.

Defendant further admits that during said period the bankrupt did deliver to defendant during the months of January and February, 1932, certain merchandise consisting of woolen suitings, a list of the same being approximately as set forth in plaintiff's bill of particulars herein. Defendant further alleges that at no time has the monetary value of said suitings ever been figured or invoiced to said bankrupt and defendant cannot obtain an accurate statement or appraisal of said amount without figuring the same. That the said woolen suitings were delivered to bankrupt and return delivery thereon taken, all pursuant to agreements as hereinafter set forth. Defendant denies each and every other allegation in said paragraph IV. contained.

III.

Answering paragraph V. defendant admits that the payment of $200.00 hereinbefore referred to was applied by said defendant on bankrupt's open account and denies each and every other allegation therein contained, except as hereinafter admitted or modified.

IV.

Answering paragraph VI. defendant denies the allegations therein contained.

V.

Answering paragraph VII. defendant has not sufficient information to admit or deny same and therefore denies the same upon information and belief.

VI.

Answering paragraph VIII. defendant admits the allegations therein contained. [8]

Further answering and by way of a first affirmative defense, defendant alleges as follows:

I.

That on or about the 25th day of November, 1931, the bankrupt was compelled to make payment by his bank of a certain trade acceptance in the amount of $100.00 and did apply to defendant to advance the same temporarily. That the said sum was advanced upon the agreement and in the consideration then and there given that said bankrupt would give his check in an equal amount, said check to be hon-

ored within the next few days; that thereafter the said check was so honored and defendant did receive the said $100.00.

Further answering and by way of a second affirmative defense, defendant alleges as follows:

I.

That defendant and bankrupt did for many months prior to the bankruptcy herein have a written agreement that certain goods would be by the defendant delivered to and placed with the bankrupt upon consignment; that it was the practice and custom that said goods would be placed with said bankrupt upon a consignment memorandum showing the number and yardage of said goods. No price was figured at said time and no invoice of said goods rendered. That the title to said property did under said agreement at all times remain in the defendant until such time as the particular piece of goods was actually paid for, even though the same had been made up into a suit.

Pursuant to said agreement, defendant had placed with said bankrupt a large quantity of woolen suiting materials; that said materials were, pursuant to said agreement, made up into suits. That in January and February of 1932, a check of [9] bankrupt's stock was made and it was ascertained that certain designated patterns had been made into suits pursuant to said consignment agreement. It was then and there agreed by the defendant and said bankrupt that the assignment of accounts in the approxi-

mate amount of $2694.25, all of which were accounts arising from the use of materials consigned by defendant to bankrupt, would be made to the defendant in consideration of the said woolen suitings so used and the release by defendant of its lien and rights to certain other accounts arising from the use of materials consigned to the bankrupt; that said accounts were so accepted by said defendant in full and complete payment of said suitings so consigned and the release of certain other accounts.

* * * * * * * *

Further answering and by way of a third affirmative defense, defendant alleges as follows:

I.

Defendant repeats and makes a part hereof the first two paragraphs of paragraph I. of the second affirmative defense herein.

II.

That pursuant to said agreement and custom, the said defendant did during various times place with the said bankrupt a large quantity of woolen suiting material of different numbers and yardage. That said goods were consigned to said bankrupt, title to the same remaining in defendant and at no time passing to said bankrupt. No invoice of said goods was ever rendered to said bankrupt. That during January and February, 1932, defendant desiring the return of all consigned merchandise, did demand the return thereof from said bankrupt. The woolen suiting material then on hand under consignment

corres- [10] ponded approximately with the list as set forth in plaintiff's bill of particulars. That upon demand by said defendant, the bankrupt did return said materials to the defendant. That no part of said materials was a part of bankrupt's estate or should be accounted for therein.

WHEREFORE, having fully answered, defendant prays that the plaintiff's complaint be dismissed with prejudice and that defendant be awarded his costs herein.

RIDDELL, BRACKETT & FOWLER,
Attorneys for Defendant.

State of Washington,
County of King—ss:

J. H. GARRETT, being first duly sworn, on oath deposes and says: That he is the Secretary & Treasurer of the defendant corporation and as such makes this verification; that he has read the foregoing Answer, knows the contents thereof and believes the statements therein made to be true.

J. H. GARRETT.

Subscribed and sworn to before me this 25th day of October, A. D. 1932.

CORA L. WATSON,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Oct. 31, 1932. [11]

[Title of Court and Cause.]

MEMORANDUM DECISION AFTER TRIAL.

EARL G. RICE, 1012 Lowman Building, Seattle, Wash., and McClure & McClure, 905 Lowman Building, Seattle, Wash. Attorneys for Plaintiff, Riddell & Brackett, 1121 Smith Tower, Seattle, Wash., Attorneys for Defendant.

This is a suit by the Trustee, under Sec. 60 of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 96) to recover on account of an alleged preference.

On April 11, 1932, the House of Irving, a tailor, was adjudged a bankrupt, upon petition of creditors filed March 25, 1932.

Recovery is asked on account of money paid defendant by bankrupt and on account of money collected upon accounts receivable assigned to defendant, and on account of certain merchandise, consisting of woolen suitings delivered to it by bankrupt.

The defendant, while not admitting the amounts and values alleged, does admit that within four months prior to March 25, 1932, while bankrupt was indebted to the defendant, payments by the bank- [12] rupt were made the defendant; that accounts receivable were assigned to it, which it has retained, collected and is still collecting; that merchandise consisting of woolen suitings were delivered by the bankrupt to defendant.

It is, however, contended by the defendant that the woolens had been delivered by the defendant to

the House of Irving upon consignment; that title had never passed to bankrupt; that defendant was entitled to retake possession of its merchandise and receive payments on accounts arising from the sale by bankrupt of the consigned merchandise.

The written contract between the defendant and bankrupt, entered into in July, 1930, was as follows:

> "MEMORANDUM AGREEMENT
>
> THIS MEMORANDUM AGREEMENT made and entered into on this 26th day of July, 1930, by and between KEMP-BOOTH COMPANY, LIMITED, a corporation, party of the first part, and HOUSE OF IRVING, a corporation, party of the second part, both of Seattle, Washington, WITNESSETH:
>
> FIRST: The party of the first part agrees during the life of this agreement to consign from time to time such of its goods to the party of the second part as are suitable for sale for the party of the first part by the party of the second part.
>
> SECOND: The value of the said goods that shall be in the possession of the party of the second part shall at no time exceed the sum of Three Thousand ($3,000.00) dollars.
>
> THIRD: The party of the second part shall receive such commission for selling the same as may be stipulated by the party of the first part.
>
> FOURTH: The party of the second part shall account to, and settle with, the party of the

first part on the first day of [13] each and every month during the life of this agreement at the sale price fixed by the party of the first part for all merchandise covered by this agreement sold during the previous month, less commission; and the party of the second part hereby guarantees to the party of the first part the collection and payment promptly on the first day of each month of the sale price of all merchandise sold during the previous month.

FIFTH: The party of the second part shall furnish to the party of the first part on the first day of each and every month, beginning September 1, 1930, an inventory of the exact merchandise held by it for the party of the first part.

SIXTH: The party of the second part shall keep all of the said merchandise in its possession covered with fire and burglary insurance in policies running to the party of the first part, and shall keep the said merchandise seggregated from other merchandise on the premises.

SEVENTH: Either party to this agreement may terminate the same by giving to the other three days' written notice of its intention to terminate the same, and at the termination thereof all goods in possession of the party of the second part belonging to the party of the first part shall be returned to the party of the first part.

EIGHTH: The party of the first part shall have the right to check up and inspect and/or to withdraw any part or all of said merchandise at any time without notice to the party of the second part.

NINTH: It is distinctly understood and agreed that the title to all such merchandise as may be consigned to the party of the second part by the party of the first part shall remain in the party of the first part, and that the party of the second part [14] have no title thereto whatsoever, but have the right to sell the same for the party of the first part under the terms and conditions stated. The prices and terms on which the same may be sold are to be furnishd from time to time by the party of the first part.

TENTH: The party of the second part shall have the right, until otherwise directed in writing by the party of the first part, to make up any part or parts of said merchandise into garments, but in such case the title to all such garments shall remain in the party of the first part; and on the sale of any and all such garments the party of the second part shall receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise.*

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals

(*Emphasis supplied by the Court)

the day and year in this certificate first above written.

KEMP-BOOTH COMPANY LIMITED

Witnesses:

Kathryn A. Schmitz as to

By J. H. Garrett, Secretary,

Party of the First Part.

HOUSE OF IRVING

Wm. A. Hail as to

By J. H. Irving, President,

Party of the Second Part

J. H. Irving."

The foregoing contract was never filed with the County Auditor (as a conditional sales contract) as provided by Sec. 3790, Remington's Revised Statutes of Washington (since amended by Washington Laws of 1933, page 465, Sec. 1, Remington's Revised [15] Statutes of Washington, Annual Pocket Part, Sec. 3790) nor as a chattel mortgage as provided by Sec. 3781, nor recorded as required by Sec. 3788.

PLAINTIFF cites: Meacham on Sales, Sec. 43; Sturm v. Boker, 150 U. S. 312, 329, 37 E. Ed. 1093, 1100; Ludvigh v. American Woolen Co. of N. Y. 31 ABR 481, 231 U. S. 522; Gem Electric Co. v. Brower, 34 ABR 642, 221 Fed. 597, (9th CCA); Miller Rubber Co. v. Citizens etc. Bank, 37 ABR 542, 233 Fed. 488 (9th C. C. C.); In re King, 45 ABR 95, 262 Fed. 318 (9th C. C. A.); In re Wells, 140 Fed 752; In re

National Home and Hotel Supply Co., 226 Fed. 840, 844; 35 A. B. R. 139; In re Eichengreen, 18 Fed. (2d) 101, 104; Reliance Shoe Co. v. Manly, 25 Fed. (2d) 381, 383; In re Wanskaser, 30 Fed. (2d) 510, 515; In re Moore, 11 Fed. (2d) 62; Globe Bank v. Martin, 236 U. S. 288, 35 S. Ct. 377, 29 L. Ed. 583; Ex parte White, L. R. 6, Chan. App. 397; Meacham on Sales, Sec. 46, In re Penny & Anderson, 176 Fed. 141; In re Garcewich, 115 Fed. 87; Peoria Manuf'g Co. v. Lyons, 38 NE 661; Rem. Comp. Statutes, Sec. 3790; Buffum v. Dexter, 96 NW 352; Peek v. Heim, 17 Atl. 984; Thompson v. Paret, 94 Pa. St. 275; Laflin and Rand Powder Company v. Burkhardt, 97 US 110, 116, 24 L. Ed. 973; In Potter v. Mt. Vernon Roller Mill Co., 101 Mo. A. 581, 584, 73 SW 1005; Buffum v. Merry, 3 Mason 478, 4 Fed. Cas. 604; Austin v. Seligman, 18 Fed. 519; Chisholm v. Eagle Ore Sampling Co., 144 Fed. 670; Jenkins v. Eichelberger, 4 Watts 121, 28 Am. Dec. 691; Morton v. Woodruff, 2 NY 154; Foster v. Pelhome, 7 NY 433; Ewing v. French, 1 Blackford's Rep. 353; Slaughter v. Green, 1 Randolph 3, 10 Amer. Dec. 488; Chase v. Washburn, 1 Ohio St. Rep. 244; Pierce v. Schenck, 3 Hill 28; Mallony v. Willis, NY 76; Seymore v. Brown, 19 Johne 44; [16] In re Lee, 3 NY 152; Mitchell Wagon Co. v. Poole, 235 Fed. 817; Taylor v. Fram, 252 Fed. 465; In re Leflys, 229 Fed. 675, 36 ABR 306; Chickering v. Boskess, 22 NE 542; In re Babenau, 118 Fed. 47; Newmark on Sales, Sec. 23; Weston v. Brown, 53 NE 36; In re Martin—Vernan

Music Co. v. 132 Fed. 983, 984; In re U. S. Electrical Supply Co., 2 Fed. (2d) 378; In re Agnew, 178 Fed. 478, 481, 23 ABR 360; In re Highgrade Electrical Store, 3 Am BR (NS) 78; Miller Rubber Co. v. Citizens Trust, 37 ABR 542; In re Newerf's Estate, 233 Fed. 488, 147 CCA 374; In re Pierce, 157 Fed. 757; Flanders Motor Co. v. Reed, 220 Fed. 642, 33 ABR 842; John Deere Plow Co. v. McDavid, 177 Fed. 802; Franklin v. Stoughton Wagon Co., 168 Fed. 857; In re King, 262 Fed. 318; Gen. Elec. Co. v. Brower, 221 Fed. 597; In re Shiffert, 281 Fed. 285; Schultz as trustee v. Wesco Oil Co., 149 Wash. 21; In re Wells, 140 Fed. 752; Taylor v. Fram, 252 Fed. 465; Granite Roofing Co. v. Casler, 46 NW 728; Buffum v. Descher, 96 NW 352; In re Lenforth, Fed. Case. 8369; In re Roellech, 223 Fed. 687, 35 ABR 164; Rasmussen case, 136 Fed. 704; In re Carpenter, 125 Fed. 831; In re Zephyr Merc. Co., 203 Fed. 576; United States v. General Electric Co., 15 Fed. (2d) 715; Yarm v. Lieberman, 46 Fed. (2d) 464, 466; Williston, Contracts, Vol. II, Sec. 621, pages 1203 and *1024*, In re Eighth Ave. 82 Wash. 398, 402, 144 Pac. 533; Arbuckle v. Kirkpatrick, 98 Tenn. 221, 39 SW 3, 36 LRA 285; Samson Tire & Rubber Co. v. Eggleston, 45 Fed. (2d) 502, 504; Eilers Music House v. Fairbanks, 80 Wash. 379; Inland Finance Co. v. Inland Motor Car Co., 125 Wash. 301; Lloyd v. McCallum Donahue Co. 127 Wash. 180; Bauer v. Commercial Credit Co., 163 Wash. 210; Renfro-Wadenstein, 47 Fed. (2d) 283 and 53 Fed. (2d) 834; Wright Dana Hardware Co.,

211 Fed. 908; Williams v. Plattner, 46 Fed. (2d) 476, 17 ABR 227; In re Niels Ohr Hein, Bankrupt, 60 Fed. (2d) 966, 19 ABR (NS) 546; 1933 Cumulative [17] Supplement to Collier on Bankruptcy, 13th Edition, pages 418 et seq; Digest of American Bankruptcy Reports, Sec. 509.

DEFENDANT cites: Sturm v. Boker, 150 U. S. 312, 37 L. Ed. 1093; Ludvigh, Trustee in Bankruptcy, v. American Woolen Company, 231 U. S. 522, 56 St. Ct. 345; Eilers Music House v. Fairbanks, 80 Wash. 379; Inland Finance Co. v. Inland Motor Car Co., 125 Wash. 301; Lloyd v. MacCallum-Donahoe Co. 127 Wash. 180; Bauer v. Commercial Credit Co., 163 Wash. 210; In re Renfro-Wadenstein, 47 Fed. (2d) 238 and 53 Fed. (2d) 834; In re Wright Dana Hardware Company, 211 Fed. 908; Simpson v. Western Hardware Company, 227 Fed. 304; Mitchell Wagon Co. v. Poole, 235 Fed. 817; In re Galt, 120 Fed. 64; Franklin v. Stoughton Wagon Co. 168 Fed. 857; In re Smith & Nixon Piano Co., 149 Fed. 111; In re King, 262 Fed. 318; In re Thomas, 231 Fed. 513; Bransford v. Regal Shoe Co., 237 Fed. 67; In re National Home & Hotel Supply, 226 Fed. 840, 847; In re Weisl, 300 Fed. 635, 640; McElwain-Barton Shoe Co. v. Bassett, 231 Fed. 889; Bartling Tire Co. v. Coxe, 288 Fed. 314; Thomas v. Field-Brundage Co., 215 Fed. 891; Collier on Bankruptcy, 13th Ed., 1291; Reber v. Shulman, 179 Fed. 574; 24 ABR 782 and 183 Fed.

564, 25 ABR. 475; Dugan v. Crabtree, 299 Fed. 115, 3 ABR (NS) 47.

CUSHMAN, District Judge:

With the Tenth provision in this contract the transaction was one of sale and not consignment. Buffum v. Merry, 3 Mason 478, Fed. Case No. 2,112, opinion by Judge Story; Commissioner of Internal Revenue v. San Carlos Milling Co., 63 Fed. (2d) 153-154 (9th CCA); Borman v. United States, 262 Fed. 26-34; Baltimore & Ohio R. Co., vs. Western Union Telegraph Co., 241 Fed. 162-170. [18]

In view of the foregoing, it is not necessary to determine other of the questions which have been argued.

The Trustee is entitled to recover the money paid the defendant by bankrupt, other than the $100.00, as an advance for the payment by bankrupt on account of a trade acceptance. As to this particular item there was a present consideration.

The Trustee is also entitled to the return of the uncollected accounts receivable, together with the amounts which the defendant has collected upon the accounts, and, at his election, the return of all merchandise remaining in defendant's possession or the value thereof at the time the same was taken by the defendant from the bankrupt. Concerning the amounts and values, should the parties be unable to agree, they will be further heard upon the settlement of the findings of fact, conclusions of law and judgment, all of which will be settled upon notice.

The Clerk is directed to notify the attorneys for the parties of the filing of this decision.

[Endorsed]: Filed Apr. 7, 1934. [19]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on regularly for trial before the court, the Honorable Edward E. Cushman, District Judge, presiding, and a jury being waived, on November 21, 1933; the plaintiff being present and represented by Earl G. Rice and Wm. E. McClure, his counsel; the defendant being represented by James H. Garrett, its secretary, and by Charles F. Riddell, its counsel; and witnesses having been sworn and examined on the issues of fact raised by plaintiff's bill of complaint in equity and the defendant's answer thereto, and having been continued from time to time until December 4, 1933, at which time the Court, having heard the arguments of counsel, and considered the testimony and the evidence, took the case under advisement with privilege reserved to counsel for the parties to file briefs, and thereafter said briefs having been filed; the Court on April 7, 1934, having filed and entered his memorandum decision herein and ordered Findings; now, therefore, the Court, in conjunction with the Findings of Fact and Conclusions of Law embodied in the memorandum decision filed herein April 7, 1934, makes the following: [20]

FINDINGS OF FACT

I.

That J. M. Galvin, the plaintiff, is a resident of King County, in the Western District of Washing-

ton, and a citizen of the State of Washington, and at all times herein mentioned was and now is trustee in bankruptcy of House of Irving under the provisions of the Bankruptcy Act of 1898 and amendments thereof; and this bill of complaint in equity is brought to recover a preference under Sec. 60-b of the Act.

II.

That at all times herein mentioned House of Irving was and is a Washington corporation; and the defendant, Kemp-Booth Company Limited, was and is a Washington corporation with its principal place of business in Seattle, King County, Washington.

III.

That on April 11, 1932, the House of Irving, a corporation, was adjudged bankrupt by order that day duly entered in Bankruptcy cause No. 32348 by the United States District Court for the Western District of Washington, Northern Division, sitting at Seattle, on involuntary bankruptcy petition filed March 25, 1932, by creditors against House of Irving; on May 2, 1932, plaintiff was duly appointed trustee of the bankrupt, and ever since and now is such trustee, duly qualified and acting.

IV.

That on July 26, 1930, and for a long time prior thereto, and at all times subsequent thereto, the said corporation, House of Irving was, has been and is insolvent, and for more than four months

prior to March 25, 1932, was indebted to the defendant and to other creditors of the same class on unsecured debts provable in bankruptcy in the sum of approximately $20,000.00; that on said July 26, 1930, and at all times subsequent thereto, [21] said Kemp-Booth Company Limited, through its officers, had knowledge of the insolvency of said House of Irving.

V.

That within four months prior to March 25, 1932, the bankrupt paid to the defendant in money the sum of $600.00 in amounts and on dates as follows: December 14, 1931, $200.00; December 29, 1931, $200.00; January 20, 1932, $200.00.

VI.

That within four months prior to March 25, 1932, the further and additional sum of $100.00 was paid to the defendant by the bankrupt under the following circumstances; On November 25, 1931, the defendant, being a creditor of the bankrupt on open account for the sum of $1911.00, and in addition thereto being the holder of a certain trade acceptance for $200.00 which by its terms fell due and became payable on November 25, 1931, and the bankrupt being unable on that date to pay said trade acceptance, but being able to pay one-half thereof, and the bankrupt having notified the defendant that it was unable to pay said trade acceptance, and said trade acceptance having been placed in the Pacific National Bank of Seattle, the depositary of defendant, prior thereto, defendant having been given

credit for the face value of said trade acceptance on its account by said bank on its endorsement and guaranty of said trade acceptance when due; thereupon, to present the dishonor of said trade acceptance and the surcharging of the same against the account of the defendant, the defendant made, executed and delivered to the bankrupt its check for $100.00 dated November 25, 1931, and received from the bankrupt therefor the bankrupt's check for $100.00 payable to the order of the defendant, postdated November 30, 1931; that on November 25, 1931, the bankrupt used the defendant's check for $100.00, together with $100.00 of its own money, to pay the trade acceptance at the [22] bank, and on November 30, 1931, paid said postdated check of $100.00.

VII.

That within four months prior to March 25, 1932, the bankrupt assigned and transferred to the defendant certain accounts receivable of the face value of $2694.25, the same being part of the bankrupt's property, on the following dates: January 29, 1932, accounts aggregating $2408.25; and on February 18, 1932, accounts aggregating $286.00; that the defendant assigned and transferred, for collection, to the Pacific National Bank of Seattle said accounts receivable, and at the time of the trial of this cause there had been collected by said bank and paid over to the defendant on account of certain of said accounts receivable the aggregate amount of $905.50; that since the trial of said cause there has been collected no additional amount; that there remains in

the hands of the defendant or said Pacific National Bank of Seattle for collection, the balance of said accounts receivable so assigned by the bankrupt to defendant.

VIII.

That within four months prior to March 25, 1932, towit, on or about February 24, 1932, the bankrupt transferred and delivered to the defendant certain merchandise consisting of woolen suitings of the stipulated and agreed value of $1652.23; that the defendant ever since then has exercised dominion over said merchandise, asserted title thereto and sold a part of the same, and that the unsold portion of said suitings so delivered by the bankrupt to the defendant has been so intermingled with the other stock of the defendant corporation that it cannot now be identified.

IX.

That each and every of said payments of money, assignment [23] of accounts receivable and transfer and delivery of merchandise was made by the bankrupt to be applied, and was by the defendant applied upon defendant's claim against the bankrupt, which was thereby paid substantially in full; that the effect of such cash payments and transfers by the bankrupt to the defendant was and is an appropriation of the assets of the bankrupt and a depletion of the insolvent fund, and was made so as to enable the defendant to obtain a greater percentage of its debt than any other creditor of the bankrupt

of the same class as the defendant, and such transfers and payments were and are each a preference under the Bankruptcy Act of 1898 and the amendments thereto; save and except, however, a payment by the bankrupt to the said defendant of the sum of $100.00 on or about November 30, 1931, which was for a present consideration.

X.

The defendant received such payments and transfers knowing, or having reasonable cause to believe, that said bankrupt was insolvent, and that it was receiving a preference under the Bankruptcy Act and the laws of the State of Washington.

XI.

That plaintiff has insufficient assets in his hands to pay in full the indebtedness of the bankrupt, or any more than approximately 10% of the amount of the claims of the general creditors, which aggregate about $17,000.00 in addition to the indebtedness owing by the bankrupt to the defendant.

XII.

That heretofore and prior to the commencement of this action the plaintiff duly demanded of the defendant the restitution and return to the estate in bankruptcy of the money and property preferentially transferred, as above found, but the same was refused. [24]

XIII.

That on July 26, 1930, and at all times herein mentioned, the defendant was and is a wholesale

woolen house, and the bankrupt was and is a merchant tailor; and on said date the defendant and the bankrupt did enter into a written agreement in words and figures as follows, towit:

(Here is set out the contract of July 26, 1930, a copy of which appears in the court's memo decision of April 7, 1934, supra.) [25]

XIV

That pursuant to said agreement, thereafter at divers times prior to the adjudication in bankruptcy of said bankrupt, the defendant delivered to the bankrupt certain merchandise consisting of woolen suitings; that the bankrupt consumed a portion of said merchandise in the conduct of its business in making tailor made suits for its customers; that the bankrupt never sold any of said merchandise to any person whomsoever; that a portion of said merchandise from time to time was re- [26] turned by the bankrupt to the defendant and credit was given therefor; that the merchandise hereinabove described as having been returned by the bankrupt to the defendant was all such merchandise as remained in the possession of the bankrupt previously delivered pursuant to said written agreement on or about said February 24, 1932.

XV.

That said written contract was never filed in the office of the County Auditor as a conditional sale contract, as provided by Section 3790 of Remington's Revised Statutes of Washington, since

amended by Washington laws of 1933, page 465, Section 1, Remington's Revised Statutes of Washington annual pocket part, Section 3790; nor was said agreement ever recorded as a chattel mortgage, as provided by Section 3781, nor recorded as provided by Section 3788 of said Remington's Revised Statutes of Washington.

XVI.

Within four months prior to March 25, 1932, to-wit, on or about February 24, 1932, the bankrupt delivered to the defendant certain merchandise consisting of woolen suitings of the stipulated and agreed value of $1652.23, which said merchandise had theretofore been delivered by the defendant from time to time from its stock of merchandise to the said House of Irving under the terms of said written contract hereinbefore set out in paragraph numbered XIII. Since the defendant received back the said merchandise from the said bankrupt on or about the 24th day of February, 1932, the defendant has exercised dominion over said merchandise, asserted title thereto and sold a part of the same and the unsold portion of said suitings so delivered by the bankrupt to the defendant have been so intermingled with the other stock of the defendant that the same cannot now be [27] identified.

XVII.

Plaintiff has insufficient assets in his hands to pay the full indebtedness of the bankrupt or any

more than approximately 10 per cent of the amount of the claims of all other general creditors which aggregate about $17,000.00.

DONE in Open Court this 7th day of Nov., 1934.

EDWARD E. CUSHMAN,

Judge.

Upon the foregoing Findings of Fact, Supplemental findings of fact 1 & 2, and those included in the memorandum decision dated April 7, 1934, the court as a matter of law concludes as follows:

I.

That plaintiff is entitled to recover from the defendant $600.00, which amount was paid by the bankrupt to the defendant, with interest at the rate of 6% per annum upon $200.00 thereof from December 14, 1931, to the date of decree; upon $200.00 thereof from December 29, 1931, to the date of decree; and upon $200.00 thereof from January 20, 1932, to the date of decree.

II.

That plaintiff is further entitled to recover from defendant on account of merchandise transferred and delivered by bankrupt to defendant on or about February 24, 1932, $1,652.23, with interest at the rate of 6% per annum from that date until the date of decree.

III.

That plaintiff is entitled to recover from the defendant because of accounts receivable transferred

by the bankrupt to the defendant, of the face value of $2,699.25, the amount collected, towit: $905.50, with interest thereon at the rate of 6% [28] per annum from November 21, 1933, to the date of decree.

IV.

That plaintiff is entitled to the accounts receivable which have not been collected or reassigned to the plaintiff.

V.

That plaintiff is entitled to recover his costs and disbursements herein to be taxed.

VI.

That decree be entered in accordance herewith.

DONE in Open Court this 7th day of Nov., 1934.

EDWARD E. CUSHMAN,

Judge.

Presented by Earl G. Rice.

[Endorsed]: Lodged Oct. 4, 1934.

[Endorsed]: Filed Nov. 7, 1934. [29]

[Title of Court and Cause.]

SUPPLEMENTAL FINDING OF FACT NO. 1

In order to make a record of a fact occurring since the trial of this cause, the court makes the following

SUPPLEMENTAL FINDING OF FACT:

On the 3rd day of November, 1934, the defendant made, executed and delivered to the plaintiff an

assignment of the following accounts which had been assigned by the House of Irving, the bankrupt herein, to the defendant, Kemp-Booth Company Limited, as set forth in the Findings of Fact herein:

Name of Debtor	Amount Owing
Kenneth Atkins,	$50.00
R. L. Brackett,	128.50
Dr. E. F. Cornellussen,	54.50
Asahel Curtis,	10.00
J. C. Dummett,	31.00
L. S. Duryee,	50.00
A. B. England,	150.00
C. G. Evans,	115.00
H. J. Hartnett,	11.50
Frank Heffernan,	149.00
Dave Himelhoch,	39.50
Ed. Hogg Jr.,	96.00
Charles Holcomb,	35.00
A. Everett Miller,	82.00
John S. Mountain,	30.00
L. C. Nesbit,	26.50
Dr. D. H. Nickson,	35.00

[30]

A. V. Peterson,	38.00
Hugh Phelps,	110.00
Don H. Phillips,	30.00
Irving Ringer,	165.75
M. H. Shindell,	127.00
John W. Sparling,	75.00
R. S. Talbot,	42.00

The following accounts which arose from the making of suits out of cloth which was furnished by the defendant:

Customer's Name	Balance Due
Thomas S. Allen,	34.50
C. F. Lester,	18.50
Lew Wallace,	54.00

have not been re-assigned to the plaintiff.

DONE in Open Court this 7th day of November, A. D. 1934.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed Nov. 8, 1934 [31]

[Title of Court and Cause.]

SUPPLEMENTAL FINDING OF FACT NUMBER 2

The Court, upon further consideration of Plaintiff's proposed Finding of Fact No. XX, makes now the following Supplemental Finding of Fact No. 2:

Subsequent to the execution of the agreement set out in Finding XIII and without knowledge of the same the following became creditors of the bankrupt House of Irving in the amounts set opposite their respective names:

Metropolitan Building Company, landlord rent,	$1731.89
Seattle Broadcasting Station K.O.L., advertising	647.13
Seattle Daily Times, advertising,	463.60

DONE in Open Court this 8th day of November, 1934.

EDWARD E. CUSHMAN,
District Judge.

Defendant excepts to the foregoing Finding on the grounds that the same is not supported by the evidence and is contrary to the evidence and is not within the issues in the case and has no bearing upon the validity of the written agreement described in Finding XIII.

RIDDELL & BRACKETT,
Attorney for Defendant.

Exception allowed.

EDWARD E. CUSHMAN,
Dist. Judge.

[Endorsed]: Filed Nov. 8, 1934 [32]

[Title of Court and Cause.]

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause having come on regularly for trial before the court, the Honorable Edward E. Cushman, District Judge, presiding, and a jury being waived, on November 21, 1933; the plaintiff being present and represented by Earl G. Rice and William E. McClure, his counsel; the defendant being represented by James H. Garrett, its secretary, and by Charles F. Riddell, its counsel, and witnesses having been sworn and examined on the

issues of fact raised by plaintiff's bill of complaint in equity and the defendant's answer thereto, and having been continued from time to time until December 4, 1933, at which time the court, having heard the arguments of counsel, and considered the testimony and the evidence, took the case under advisement with privilege reserved to counsel for the parties to file briefs, and thereafter said briefs having been filed, the court on April 7, 1934, having filed and entered his memorandum decision herein and ordered these Findings, now, therefore, the Court makes the following [33]

FINDINGS OF FACT:

James M. Galvin, the plaintiff, is a resident of King County, in the Western District of Washington, and a citizen of the state of Washington, and at all times herein mentioned was and now is trustee in bankruptcy of House of Irving under the provisions of the Bankruptcy Act of 1898 and amendments thereof; and this bill of complaint in equity is brought to recover a preference under Sec. 60-b of the Act.

II.

At all times herein mentioned House of Irving was and is a Washington corporation, and the defendant, Kemp-Booth Company Limited, was and is a Washington corporation with its principal place of business in Seattle, King County, Washington.

III.

On April 11, 1932, the House of Irving, a corporation, was adjudged bankrupt by order that day duly entered in Bankruptcy cause No. 32348 by the United States District Court for the Western District of Washington, Northern Division, sitting at Seattle, on involuntary bankruptcy petition filed March 25, 1932, by creditors against House of Irving; on May 2, 1932, plaintiff was duly appointed trustee of the bankrupt and ever since and now is such trustee, duly qualified and acting.

IV.

On July 26, 1930 and for many years prior thereto and approximately until the filing of the bankruptcy proceedings which are involved in this litigation, the said House of Irving was and continued to be engaged in the retail merchant tailoring business in the city of Seattle with minor stocks of merchandise consisting of suit patterns and samples in the possession of agents in several other cities in the state of Washington. [34] During said entire period of time and continuously until the present, said defendant, Kemp-Booth Company Limited has been and is engaged in the wholesale woolen business, selling its merchandise to individual merchant tailors.

V.

For several years prior to July 26, 1930, as a result of a disagreement, said House of Irving had been doing a minimum amount of business with

Kemp-Booth Company Limited and on the date last aforesaid owed it on open account the sum of $485.59, the oldest item of which was from thirty-five to forty days old.

VI.

For many years prior to July 26, 1930, the consignment of merchandise consisting of cloth cut to suit patterns from the wholesale woolen houses to the merchant tailors who were engaged in retailing the same in the regular course of business had been and up to the time of the bankruptcy in question in this case continued to be a recognized method of merchandising between wholesale woolen houses and retail merchant tailors. At least two of the competitors of the defendant, towit, the Ditmer Woolen Company and John B. Ellison & Sons, being wholesalers, had consigned merchandise consisting of suit patterns to said House of Irving, which consigned merchandise was re-taken by the said John B. Ellison & Sons and the said Ditmer Woolen Company immediately preceding the bankruptcy of the said House of Irving. There is no evidence in this record that the plaintiff in this case ever questioned the valdity of said consignment agreements with the said two woolen houses. On or about the 26th day of July, 1932, by an oral agreement between said House of Irving and the defendant, the defendant agreed to extend to said House of Irving a line of credit up to $3,000.00 for merchandise delivered to the said House of Irving consisting of [35] suit patterns and agreed to deliver to the said House of

Irving such suit patterns as the said House of Irving might request on consignment under the terms and conditions of a written contract which is hereinafter set out in full.

VII.

For many years prior to July 26, 1930, defendant had merchandised its woolens in the form of bolts of cloth and suit patterns, both upon sale and upon consignment, to merchant tailors upon the form of contract which was executed between the House of Irving and defendant on July 26, 1930, and which is in the following words and figures, towit:

(Here is set out the contract of July 26, 1930, a copy of which appears in the Court's Memo Decision of April 7, 1934, supra). [36]

VIII.

Almost immediately upon the execution of said written agreement between the said House of Irving and said defendant, the said balance of $485.59 due to said defendant upon open account by said House of Irving was paid and thereafter from time to time said merchandise was delivered by defendant to said House of Irving, both upon straight sale and upon consigned account. When merchandise was sold by defendant to said House of Irving it was charged upon the books of the defendant against said House of Irving and that account for goods sold continued to mount from about the month of September, 1930, until February, 1932, at which time said House of Irving ceased business. Pay-

ments on said account were made from time to time.

When merchandise was delivered by defendant to said House of Irving under the written contract which is set out in paragraph numbered VII. above, a memorandum of the number of the suiting which identified the goods in the records of the defendant and the yardage of the material delivered was noted upon a card index which was kept by the defendant. No charge was made against the House of Irving. Merchandise continued to be delivered under said written agreement from time to time. When the same was received by the House of Irving, such woolens were placed upon its shelves as suiting having attached to it a tag which bore the name and house mark of the defendant, together with the number of the suiting which sufficed to identify it. Such suitings were placed in the stock of the said House of Irving. Monthly, said defendant by a clerk examined the suitings which remained in the possession of said House of Irving; in this manner discovered those which had been sold; whereupon a charge was made upon the books of said defendant against the [37] said House of Irving and that charge was paid by the House of Irving as follows: When checks were received by the defendant from said House of Irving, the amounts thereof were applied either against the open account or against the charges for consigned merchandise which was no longer upon the shelves of the House of Irving, as said defendant determined. Such payments paid

the accounts for consigned merchandise in full until the month of July, 1931, but on the open account credit was extended and the said open account gradually increased in size so that on the 12th of February, 1932, there was due from the said House of Irving to the said defendant upon open account $2266.29 and upon the account for merchandise which was delivered under said written contract described in paragraph VII. above the amount of $1502.17.

IX.

On and for more than four months prior to March 25, 1932, said House of Irving was indebted to creditors on unsecured debts provable in bankruptcy in the sum of approximately $20,000, and that the said House of Irving had lost in its merchandising operations approximately $1,000.00 a month during the calendar years 1930 and 1931.

X.

On November 25, 1931, there fell due at the Pacific National Bank of Seattle, Washington, a trade acceptance in the sum of $200.00, which said House of Irving had executed and delivered to said defendant, and with which said defendant had credited the account of the said House of Irving and had immediately and in due course negotiated with said Pacific National Bank. On said 25th day of November, 1931, said House of Irving advised said defendant that it was unable to pay the full amount of said trade acceptance, but was able to pay one-half thereof. [38] Whereupon by an oral agreement

between said House of Irving and said defendant, said defendant exchanged with said House of Irving the check of the defendant in the sum of $100.00 for the check of Fashion Plus, which was a concern, the assets of which were taken over by the plaintiff herein as a part of the assets of the said House of Irving. With the said $100.00, the proceeds of said check of defendant, and $100.00 of its own, the said House of Irving paid the said trade acceptance on said 25th day of November, 1931, and on November 30, 1931, the said check of said Fashion Plus was paid and the money thereon received by the defendant.

XI.

On December 14, 1931, said House of Irving paid the defendant $200.00. On the 22nd day of Sept. 1931, the said House of Irving delivered to said defendant three trade acceptances in the sum of $200.00 each, the last of which was due on December 22, 1931, and paid the Pacific National Bank on Dec. 29, 1931, and also on Jan. 13, 1932 delivered acceptances due Jan. 29, 1932, February 20, 1932 and March 15, 1932. The said trade acceptances were immediately negotiated by the defendant to the Pacific National Bank which at all times thereafter and until the said House of Irving ceased to do business remained the property of the said Pacific National Bank and upon which this defendant was an indorser. Said House of Irving paid one trade acceptance to said bank in the sum of $200.00 on the 29th day of Dec. 1931, and another in the

sum of $200.00 on the 29th day of Jan. 1932, and said third and fourth trade acceptances were never paid. When the defendant receivd said trade acceptances from said House of Irving the same were credited upon the account of the said House of Irving upon the books of the defendant.

XII.

Within four months prior to March 25, 1932, the bankrupt [39] assigned and transferred to the defendant certain accounts receivable of the face value of $2694.25 on the following dates: January 29, 1932, accounts aggregating $2408.25; February 18, 1932, accounts aggregating $286.00. That the defendant assigned and transferred for collection to the Pacific National Bank said accounts receivable and that at the time of the trial of this cause there had been collected by said bank and paid over to the defendant on account of said accounts receivable the aggregate amount of $905.50. Since the trial of this cause no additional amounts have been collected and there remains in the hands of the said Pacific National Bank for collection the balance of said accounts receivable so assigned by the bank to defendant. Said accounts receivable at the time they were delivered to the defendant had a market value of 40 per cent of their face. The said accounts were turned over by said House of Irving to the defendant upon the oral request of the defendant and a representation of the said House of Irving that the said assigned accounts arose solely from merchandise which the defendant had delivered to said House

of Irving pursuant to said written contract hereinbefore set forth in paragraph VII. Upon the trial of this cause it was disclosed that many of the accounts thus turned over were created by the tailoring, sale and delivery of suits, the cloth of which was not delivered to said House of Irving under said written contract. Of the payments of $905.50 which were received by said defendant as aforesaid, the sum of $444.50 was paid upon suits, the cloth of which was delivered by the defendant to said House of Irving under said written agreement and the value of said cloth in such suits was $147.87. The expense of making said collections is not shown in this record. [40]

XIII.

Within four months prior to March 25, 1932, to-wit, on or about February 24, 1932, the bankrupt delivered to the defendant certain merchandise consisting of woolen suitings of the stipulated and agreed value of $162.23, which said merchandise had theretofore been delivered by the defendant from time to time from its stock of merchandise to the said House of Irving under the terms of said written contract hereinbefore set out in paragraph numbered VII. Since the defendant received back the said merchandise from the said bankrupt on or about the 24th day of February, 1932, the defendant has exercised dominion over said merchandise, asserted title thereto and sold a part of the same and the unsold portion of said suitings so delivered by the bankrupt to the defendant have been so inter-

mingled with the other stock of the defendant that the same cannot now be identified.

XIV.

On or about the 24th day of February, 1932, the defendant first learned that the bankrupt was in a failing condition and first knew or had reasonable cause to believe that the said bankrupt was insolvent on or about the 24th day of February, 1932.

XV.

Plaintiff has insufficient assets in his hands to pay the full indebtedness of the bankrupt or any more than approximately 10 per cent of the amount of the claims of all other general creditors which aggregate about $17,000.00.

XVI.

Heretofore and prior to the commencement of this action the plaintiff duly demanded of the defendant the return to the estate in bankruptcy of the money and property above described, but the same was refused. [41]

XVII.

The said written contract described in paragraph VII. above was never filed in the office of the County Auditor of King County, Washington, as a conditional sale contract, nor was it ever recorded as a chattel mortgage, nor was it ever recorded under Sec. 3788 of Remington's Revised Statutes of Washington.

XVIII.

There are at least four general creditors whose accounts became due by said bankrupt subsequent to the 26th day of July, 1930, as follows: Metropolitan Building Company, landlord, for rent, $1731.89; Seattle Broadcasting Station, KOL, for advertising, $285.00; Seattle Post-Intelligencer, for advertising, $647.13; Seattle Daily Times, for advertising, $463.60. None of said creditors described in this paragraph had knowledge of the said agreement set out in paragraph numbered VII. hereof.

DONE in open court this ..... day of ....., A. D. 1934.

.....

District Judge.

And from the foregoing Findings of Fact, the court deduces the following

CONCLUSION OF LAW:

I.

That the above cause should be dimissed with prejudice and the defendant should have judgment against the plaintiff for its costs and disbursements herein to be taxed.

DONE in open court this ..... day of ....., A. D. 1934.

.....

District Judge.

[Endorsed]: Filed May 7, 1934 [42]

[Title of Court and Cause.]

DEFENDANT'S EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED AND EXCEPTIONS TO THE COURT'S REFUSAL TO ENTER DEFENDANT'S PROPOSED FINDINGS AND CONCLUSIONS.

Comes now the defendant and excepts to the making and entry of the Findings of Fact and Conclusions of Law entered herein and to the refusal of the Court to enter Findings of Fact and Conclusions of Law requested by the defendant.

I.

Defendant excepts to the making and entry of Finding of Fact Number IV on the ground that the same is not supported by competent evidence.

II.

Defendant excepts to the making and entry of Finding of Fact Number V on the ground that the same is not supported by competent evidence.

III.

Defendant excepts to the making and entry of Finding of Fact Number VI on the ground that the same is not supported by competent evidence.

IV.

Defendant excepts to the making and entry of Finding [43] of Fact Number VII on the ground that the same is not supported by competent evidence.

V.

Defendant excepts to the making and entry of Finding of Fact Number VIII on the ground that the same is not supported by competent evidence.

VI.

Defendant excepts to the making and entry of Finding of Fact Number IX on the ground that the same is not supported by competent evidence.

VII.

Defendant excepts to the making and entry of Finding of Fact Number X on the ground that the same is not supported by competent evidence.

VIII.

Defendant excepts to the making and entry of Finding of Fact Number XI on the ground that the same is not supported by competent evidence.

IX.

Defendant excepts to the making and entry of Finding of Fact Number XII on the ground that the same is not supported by competent evidence.

X.

Defendant excepts to the making and entry of Finding of Fact Number XIV on the ground that same is not supported by competent evidence.

EXCEPTIONS TO CONCLUSIONS

I.

Defendant excepts to Conclusion of Law Number I on the ground that same is erroneous and not applicable to the facts proved by the evidence. [44]

II.

Defendant excepts to Conclusion of Law Number II on the ground that same is erroneous and not applicable to the facts proved by the evidence.

III.

Defendant excepts to Conclusion of Law Number III on the ground that the same is erroneous and not applicable to the facts proved by the evidence.

IV.

Defendant excepts to Conclusion of Law Number IV on the ground that the same is erroneous and not applicable to the facts proved by the evidence.

V.

Defendant excepts to Conclusion of Law Number V on the ground that the same is erroneous and not applicable to the facts proved by the evidence.

RIDDELL & BRACKETT

Attorneys for Defendant.

DEFENDANT'S EXCEPTIONS TO THE COURT'S REFUSAL TO ENTER FINDINGS AND CONCLUSIONS PROPOSED BY DEFENDANT.

I.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number I on the ground that the same is supported by all of the competent evidence in the case.

II.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number II on the ground that the same is supported by all of the competent evidence in the case. [45]

III.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number III on the ground that the same is supported by all of the competent evidence in the case.

IV.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number IV on the ground that the same is supported by all of the competent evidence in the case.

V.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number V on the ground that the same is supported by all of the competent evidence in the case.

VI.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number VI on the ground that the same is supported by all of the competent evidence in the case.

VII.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number VII on the ground that the same is supported by all of the competent evidence in the case.

VIII.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number VIII on the ground that the same is supported by all of the competent evidence in the case.

IX.

Defendant excepts to the refusal of the Court to make [46] and enter defendant's proposed Finding Number IX on the ground that the same is supported by all of the competent evidence in the case.

X.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number X on the ground that the same is supported by all of the competent evidence in the case.

XI.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Num-

ber XI on the ground that the same is supported by all of the competent evidence in the case.

XII.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number XII on the ground that the same is supported by all of the competent evidence in the case.

XIII.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number XIV on the ground that the same is supported by all of the competent evidence in the case.

XIV.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number XVI on the ground that the same is supported by all of the competent evidence in the case.

XV.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number XVII on the [47] ground that the same is supported by all of the competent evidence in the case.

XVI.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number XVIII on the ground that the same is supported by all of the competent evidence in the case.

Defendant excepts to the refusal of the Court to enter defendant's proposed Conclusions of Law as follows:

I.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Conclusion of Law Number I.

RIDDELL & BRACKETT
Attorneys for Defendant.

The foregoing exceptions to Findings of Fact and Conclusions of Law given and refused were called to the Court's attention at the time of the signing and entry of the decree herein and the said Exceptions are hereby noted.

Dated at Seattle, Washington, this 8th day of Nov., 1934.

EDWARD E. CUSHMAN
District Judge.

[Endorsed]: Lodged Oct. 4 1934.
[Endorsed]: Filed Nov. 8, 1934 [48]

In the District Court of the United States for the Western District of Washington, Northern Division.

In Equity No. 939

J. M. GALVIN, as Trustee in Bankruptcy of the House of Irving, a corporation, Bankrupt,
Plaintiff,

vs.

KEMP-BOOTH COMPANY, LIMITED, a corporation,
Defendant.

DECREE

Findings of Fact and Conclusions of Law having heretofore been made by the court and entered herein in favor of the plaintiff and against the defendant, now, therefore, it is

CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiff, J. M. Galvin as trustee in bankruptcy of the House of Irving, a corporation, bankrupt, do have and recover of and from the defendant, Kemp-Booth Company Limited, a corporation, the sum of $3581.66 with interest thereon at the rate of 6% per annum from this date, together with his costs and disbursements herein to be taxed; and it is further

CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant transfer and assign to the plaintiff all those accounts receivable formerly received by the defendant from the House

of Irving which have not been collected or reassigned to the plaintiff.

DONE in Open Court this 8th day of November, 1934.

EDWARD E. CUSHMAN,
Judge.

Presented by Earl G. Rice.

[Endorsed]: Filed Nov. 8, 1934 [49]

[Title of Court and Cause.]

DEFENDANT'S EXCEPTION TO DECREE

To the making and entry of the decree herein, defendant excepts on the ground that the same is contrary to the weight of the evidence and because there is no evidence to support the same and because the same is based upon the erroneous conclusion of law that the evidence proved a sale of goods rather than a consignment thereof.

RIDDELL & BRACKETT
Attorneys for Defendant.

Defendant's exception to the decree this day signed and filed is allowed.

Signed at Seattle, Nov. 8th, 1934.

EDWARD E. CUSHMAN
Dist. Judge.

[Endorsed]: Filed Nov. 8, 1934 [50]

[Title of Court and Cause.]

STATEMENT OF THE EVIDENCE [51]

JAMES H. GARRETT,

called as an adverse witness by the plaintiff, on

Direct Examination,

testified:

I am Secretary-Treasurer of defendant, Kemp-Booth Company Limited. The record of merchandise transactions with the bankrupt from July 26, 1930, to March 25, 1932, consists of loose sheets bound by post binders. The record of current stock was kept on cards and the record of stock on hand in box files. Merchandise disposed of appears in the transfer file.

Plaintiff's Exhibit 1 consisting of five original ledger sheets of the account kept with the bankrupt was admitted in evidence. A copy of the said exhibit is as follows: [52]

(Testimony of James H. Garrett.)

PLAINTIFF'S EX. 1

HOUSE OF IRVING
1111 Second Ave.
Seattle, Wash.

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1926						
May						
3	J 53	Int on T A	1.95			
3	J 53	"	21.83			
Jun						
18	18972	Net	2 232.43 v			
24	19077	Oct. 1 10/7 60/5	2 50.00 v			
24	19067	Oct. 1 10/7	2 78.32 v			
24	19868	Net P U	2 15.27 v			
26	19099	Jul 1 10/7/60/5	2 7.34 v			
28	19123	Oct. 1 10/7/60/5	2 39.16 v			
Jul						
19	19379	Oct 1 10/7 60/5	19.58			
19	19372	Aug 1 10/7/60/5	6.61			
21	J 60	Int on T A	16.15			
30	19538	Oct 1 10/7	166.63			
30	19543	Sep 1 10/7	.74			
Aug						
2	19793	10/7 60/5	48.33			
7	19960	Net	14.26			
14	20070	Sep 1 10/7 60/5	1.47			
16	20198	Oct 1 10/7	43.91			
17	20299	Sep 1 10/7	35.29			
19	20354	Sep 1 10/7	30.27			
26	20624	Sep 1 10/7	35.76			
29	21329	Nov 1 10/7	21.25			
24	21310	Oct 1 10/7	9.38			
Oct						
1	25050	10/7 60/5	8.50			
12	25488	Nov 1 10/7	31.67			
19	25687	Dec 1 10/7	42.50			
27	26077	Nov 1 10/7	13.13			
Sep						
16		By ALLCE		25.00	962.73	
Nov						
18	26626	10/7 60/5	38.58		1001.31	962.73
23	26733	Dec 1 10/7	32.08		1033.39	1001.31
29	26823	10/7 60/5	16.13		1049.52	1033.39

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1926						
Dec						
22	27177	Jan 1 10/7	1 10.50		1060.02	1049.52
23	R 151	By Payt		1 10.50	1049.52	1060.02
31	2935	By ALLCE		45.00	1044.52	1049.52
1927						
Jan						
11	27387	Feb 1 10/7	32.08		1036.60	1044.52
17	R 159	By Payt		422.52	614.08	1036.60
31	27930	Net P U	16.23		630.31	614.08
Feb						
17	28492	Net P U	17.87		648.18	630.31
Mar						
22	29558	May 1 7%	21.52		669.70	648.18
24	R 179	By Payt		669.70		669.70
Apr						
21	30397	Net	13.00		13.00	
May						
6	30648	Jun 1 7%	19.58		32.58	13.00
6	R 195	By Payt		13.00	19.58	32.58
21	R 200	By Payt		19.58		19.58
Jun						
2	30995	Net	17.27		17.27	
24	R 210	By Payt 30995		17.27		17.27
						[53]
Jul						
12	31485	Net P U	26.99		26.99	
22	31579	Sep 1 7%	7.83		34.82	26.99
30	31768	Sep 1 7%	11.75		46.57	34.82
Sep						
23	R 233	By Payt		46.57		46.57
Oct						
7	33350	Nov 1 7%	11.69		11.69	
8	33369	Nov 1 7%	4.42		16.11	11.69
26	33670	Dec 1 7%	20.72		36.83	16.11
Nov						
14	R 244	By Payt		36.83		36.83
29	34178	Jan 1 7%	34.16		34.16	
1928						
Jan						
16	R 255	By Payt		34.16		34.16
Jun						
14	37045	Jul 1 7%	26.59		26.59	

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1928						
Jul						
3	37277	Aug 1 7%	11.00		37.59	26.59
12	37395	Aug 1 7%	69.52		107.11	37.59
19	37533	Sep 1 7%	6.88		113.99	107.11
Aug						
15	37896	Oct 1 7%	27.63		141.62	113.99
Sep						
10	38351	GRATIS			141.62	141.62
Oct						
19	39056	Dec 1 7%	.61		142.23	141.62
24	J 189	Canc Inv 39056		.61	141.62	142.23
22	R 304	By Payt		145.58 1 —	3.96 CR	141.62
27	39668	Jan 1 7%	1 21.92		17.96	3.96
Dec						
3	39742	Jan 1 7%	1 20.72		38.68	17.96
26	40090	Feb 1 7%	1 39.00		77.68	38.68
1929						
Jan						
25	40639	Mar 1 7%	1 29.31		106.99	77.68
Feb						
25	41167	NET CASH P U	1 17.88			106.99
25	41166	Apr 1 7%	1 30.86		155.73	
Mar						
12	41543	Apr 1 7%	1 49.44		205.17	155.73
28	41821	May 1 7%	1 19.09		224.26	205.17
May						
10	42465	Jun 1 7%	1 9.56		233.82	224.26
17	42554	July 1 7%	1 19.09		252.91	233.82
20	42582	Jul 1 7%	1 7.97		260.88	252.91
21	42605	Jul 1 7%	1-3 62.51		323.39	260.88
31	42753	Oct 1 7%	4 95.85		419.24	323.39
Jun						
8	42878	Oct 1 7%	2 19.17		438.41	419.24
12	4671	MOSE RET 42878		2 19.17	419.24	438.41
Jul						
5	R 551	By Payt		1 321.28	97.96	419.24
9	R 352	By Payt		3 2.11	95.85	97.96
13	43352	Sep 1 7%	4 42.50		138.35	95.85
Aug						
5	43690	Sep 1 7%	4 7.67		146.02	138.35
17	43974	Oct 1 7%	4 27.42		173.44	146.02
19	43997	Oct 1 7%	4 46.67		220.11	173.44
Sep						
3	44442	Oct 1 7%	4 45.13		265.24	220.11

(Testimony of James H. Garrett.)

Date	Folio	Description		Charges		Credits	Balance	Previous Balance
1929								
Sep								
23	44919	Nov 1 7%	4	22.92			288.16	265.24
26	45013	Nov 1 7%	4	9.17			297.33	288.16
Oct								
1	45145	Jan 1 7%	5	53.64				297.33
3	45177	Nov 1 7%	4	14.50				
7	45251	Jan 1 7%	5	19.50			384.97	
16	45438	Dec 1 7%	4	22.92			407.89	384.97
15	45985	Jan 1 7%	5	26.44			434.33	407.89
19	46048	Jan 1 7%	5	22.92				434.33
19	46050	Jan 1 7%	5	17.19			474.44	
Dec.								
6	46284	Jan 1 7%	5	20.83			495.27	474.44
16	46426	Feb 1 7%	5	16.88			512.15	495.27
23	46496	Feb 1 7%	5	17.00				512.15
23	46497	Net cash	5	6.38				
24	46506	Feb 1 7%	5	32.66			568.19	
Jan 1930								
13	46685	Feb 1 7%	5	19.13			587.32	568.19
Feb								
10	47147	Mar 1 7%	5	30.42			617.74	587.32
20	47298	Apr 1 7%	6	19.58			637.32	617.74
Mar								
3	47438	Apr 1 7%	6	19.58			656.90	637.32
5	R 398	By Payt			4	334.75	322.15	656.90
17	47688	May 1 7%	6	36.09				322.15
17	47689	May 1 7%	6	30.94			389.18	
31	47945	May 1 7%	6	32.08			421.26	389.18
Apr								
2	47978	May 1 7%	6	12.50				421.26
7	48075	May 1 7%	6	21.67				
5	J 381	One Half Telegraph Charge to Boston	6	.90			456.33	
11	38142	Jun 1 7%	7-10	72.08				456.33
15	48192	Jul 1 7%	10	60.84			589.25	
24	48286	Jun 1 7%	10-19	32.92			622.17	589.25
29	48362	Jun 1 7%	10	41.77				622.17
29	48367	Jun 1 7%	10	22.92			686.86	
May								
2	48418	Jun 1 7%	19	1.47			688.33	686.86
12	48527	Jun 1 7%	19	.81				688.33
14	48573	Jun 1 7%	19	35.00			724.14	
19	48619	Jul 1 7%	19	27.42			751.56	724.14
24	48690	Jul 1 7%	19	19.83			771.39	751.56

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges			Credits	Balance	Previous Balance
1930								
Jun								
11	48970	Jul 1 7%	19	35.04	4		806.43	771.39
17	R 421	By Payt				282.99	523.44	806.43
28	49174	Aug 1 7%	20	12.03			535.47	523.44
Jul								
5	49240	Aug 1 7%	20	21.67				535.47
8	49267	Aug 1 7%	20	1.09				
8	49276	Aug 1 7%	20	34.38			592.61	
14	B 427	By Payt			6	173.34	419.27	592.61
15	49358	Aug 1 7%	20	38.98			458.25	419.27
18	49394	Sep 1 7%	20	27.34			485.59	458.25
31	49552	Nov 1 7%	20	229.60			715.19	485.59
Aug								
11	49660	Net cash	20	8.50				715.19
15	49731	Sep 1 7%	20	.86				
18	49770	Sep 1 7%	20	10.31			734.86	
								[55]
29	49912	Oct 1 7%	20	12.03			746.89	734.86
Sep								
12	R 437	By Payt				163.02	583.87	746.89
12	50156	Cash 7%	7	153.68	7		737.55	583.87
16	50225	Oct 1 Net	9	203.86			941.41	737.55
27	50426	Oct 1 Net	9	14.21			955.62	941.41
Oct								
7	50650	Cash 7%	8	149.19			1104.81	955.62
9	R 443	By Payt			8	149.19	955.62	1104.81
9	R 443	By Disc Payt 9/12 3%				4.61	951.01	955.62
14	50776	Nov 1 7%	20-21	8.67			959.68	951.01
17	50857	Nov 1 7%	21	9.17				959.68
20	50902	Dec 1 7%	21	44.59			1013.44	
24	50979	Dec 1 7%	21	15.42	9		1028.86	1013.44
24	R 448	By Payt				218.07	810.79	1028.86
27	51017	Dec 1 7%	21	34.38				810.79
29	51054	Dec 1 7%	21	21.56		866.73		
Nov								866.73
1	51115	Net 30 days	21	21.94				
3	51128	Dec 1 7%	21	16.88				
3	51133	Net 30 days	21	34.53				
4	51163	Cash 7%	10	68.76				
5	51185	Dec 1 7%	21	15.47				
6	51195	Net 30 days	21	22.76				
10	51248	Net 30 days	21	16.25			1063.32	
13	51289	Net 30 days	21	16.25				1063.32
14	51316	Net cash	21	13.80				
15	51322	Dec 1 7%	21	16.88			1110.25	

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges		Credits		Balance	Previous Balance
1930								
Nov.								
18	51349	Net cash	10	54.34				1110.25
18	51350	Dec 1 7%	21	6.50			1171.09	
24	51461	Net cash	10	31.68			1202.77	1171.09
25	51487	Net 30 days	21	16.25			1219.02	1202.77
Dec								
1	51565	Net 30 days	21	21.95				1219.02
2	51580	Jan 1 7%	21	7.66			1248.63	
9	51684	Net 30 days	21	22.76				1248.63
10	51709	Net 30 days	21	16.45				
10	51714	Cash 7%	10	88.28			1376.12	
11	R 462	By Payt			10	453.19	922.93	1376.12
19	51826	Feb 1 7%	21	24.38			947.31	922.93
24	51868	Net 30 days	21	16.25			963.56	947.31
29	51895	Net 30 days	21	16.25				963.56
29	51907	Net 30 days	21	18.28				
30	51911	Feb 1 7%	21	7.19				
31	51938	Cash 7%	11	80.43			1085.71	
Jan	1931							
2	51959	Cash 7%	21	19.17				1085.71
6	51993	Feb 1 7%	12-21	46.67				
8	52023	Feb 1 7%	21	25.88			1177.43	
15	52111	Mar 1 7%	21	27.31			1204.74	1177.43
19	5342	Mdse Retd 51993			12	38.00	1166.74	1204.74
20	R 472	By Payt			11	80.43	1086.31	1166.74
27	52251	Net 30 days	21	25.59			1111.90	1086.31
Feb								
2	52358	Mar 1 7%	21	7.67				1111.90
5	52400							
	&							
	52399	Cash 7%	13-14	424.27				
10	52468	Mar 1 7%	21-23	38.34			1582.18	
24	52669	Mar 1 7%	23	20.13				1582.18
								[56]
Mar								
	59315	Mar 1 Net	23	.61			1602.92	
4	52771	Net 30 days	23	15.84				1602.92
5	52797	Apr 1 Net	23	33.92				
6	52814	Apr 1 7%	23	13.75				
12	52888	May 17%	23	59.16			1725.59	
12	R 486	By Payt			13	150.00		1725.59
19	R 489	By Payt			14	274.27	1301.32	
17	52987	June 1 Net	23	16.25			1317.57	1301.32

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges		Credits		Balance	Previous Balance
1931								
Apr								
2	53292	Net 30 days	23	15.23				1317.57
3	53301	Net 30 days	23	16.25				
8	53380	Net cash	23	16.78			1365.83	
14	53490	May 1 7%	23	4.47				1365.83
16	53510	Net cash	15-18	65.00				
16	53511	Cash 7%	15-16-17	254.61				
16	53530	Cash 7%	15	34.59			1724.50	
20	53581	June 1 7%	23	29.58				1724.50
20	53585	June 1 7%	23	22.92			1777.00	
29	R 502	By Payt			15	136.60	1640.40	1777.00
May								1640.40
1	53789	Net 30 days	23	15.23				
1	53796	June 1 7%	23	31.67				
4	53814	June 1 7%	23	22.92				
5	53836	Net 30 days	23	6.50				
8	53895	Jun 1 Net	23	6.09				
8	53899	Jun 1 7%	23	3.72			1726.53	
11	53915	Jun 1 Net	23	15.84				1726.53
13	53959	Jun 1 7%	23	21.67				
13	53960	Net cash	23	16.25				
14	53976	Aug 1 7%	23	104.99			1885.28	
9	R 505	By Payt			16	100.00	1785.28	1885.28
11	R 505	By Payt			17	111.10		1785.28
12	R 506	By Payt			18	6.50	1667.68	
15	53995	Cash 7%	19	73.34				1667.68
19	54066	Jul 1 7%	23	18.66			1759.68	
22	54108	Net cash	23	26.21			1785.89	1759.68
Jun								
2	54229	Jul 1 7%	23	9.38			1795.27	1785.89
8	54317	Jul 1 7%	23	44.44			1839.71	1795.27
9	R 512	By Payt			19	203.97	1635.74	1839.71
13	54379	Jul 1 7%	23	26.25				1635.74
17	54427	Jul 1 7%	23	19.09			1681.08	
20	54471	Aug 1 7%	23	17.88				1681.08
23	54510	Net 30 days	23	21.94			1720.90	
24	54528	Aug 1 7%	23	22.92			1743.82	1720.90
26	54551	Net 30 days	23	24.38				1743.82
29	54588	Aug 1 7%	23	14.88				
29	54594	Aug 1 7%	23	9.75				
30	54680	Sep 1 7%	23	14.17			1807.00	

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1931						
Jul						
1	54621	Net 30 days	16.25			1807.00
1	54623	Aug 1 7%	30.28			
6	54656	Aug 1 7%	32.67			
6	54668	Aug 1 7%	20.78			
13	54714	Cash 7%	20 105.85			
13	54715	Net cash	16.25			
10	J 551	By T/A		20 500.00	1529.08	
17	54758	Aug 1 7%	18.56		1547.64	1529.08
						[57]
21	R 520	By Payt Discount		20 10.59	1537.05	1547.64
29	54853	Net 30 days	21.58		1558.63	1537.05
Aug						1558.63
19	55080	Sep 1 7%	10.88			
21	55100	Net 30 days	64.75		1634.26	
Sep						
9	55346	Net 30 days	38.74			1634.26
10	55350	Oct 1 7%	19.58			
10	55358	Oct 1 7%	7.83		1700.41	
17	55498	Cash 7%	151.67			1700.41
17	55499	Net cash	15.42		1867.50	
23	55592	Nov 1 7%	7.83			1867.50
22	J 575	By T/A		21 600.00	1275.33	
Oct						
1	55715	Net 30 days	14.63			1275.33
5	55779	Net 30 days	6.00		1295.96	
13	55889	Cash 7%	47.92		1343.88	1295.96
16	55952	Net 30 days	30.00			1343.88
19	55970	Net 30 days	14.63		1388.51	
24	56086	Net 30 days	1.12		1389.63	1388.51
Nov						
6	56250	Net 30 days	14.63		1404.26	1389.63
11	56321	Dec 1 7%	19.58			1404.26
11	56322	Net 30 days	15.00		1438.84	
18	56432	Cash 7%	95.42			1438.84
18	56433	Net cash	10.00		1544.26	
25	C 580	Check Advance	22 100.00		1644.26	1544.26
Dec						
1	R 546	By Payt		22 100.00	1544.26	1644.26
14	R 549	By Payt		23 200.00	1344.26	1544.26
Jan 1932						
13	J 623	By T/A		23 600.00	744.26	1344.26

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges		Credits	Balance	Previous Balance
1932							
Feb							
10	R 560	By Payt		24	5.00	739.26	744.26
17	R 561	By Payt		24	50.00	689.26	739.26
17	J 634	Tfr from Fashion Plus	184.95			874.21	689.26
Jan							— 874.21
29	J 637	Payment by Assigned A/C of House of Irving			2408.25		
Feb							
18	J 637	Payment by Assigned A/c			280.00		
18	J 637	Transfer Payts to Assigned Accounts 24	55.00			—1765.04	
							—1765.04
24	C 601	Advance on T/A	200.00			—1565.04	—1565.04
12	57436	Cash 7%	1096.94				
12	57436	Net Cash	253.62			— 214.48	
24	57547	Cash 7%	57.81			— 156.67	— 214.48
29	J 638	Correction on Assignments Under Date of 1/29/32	.50			— 156.17	— 156.67
Mar							— 156.17
16	C 606	T/A Retd.	200.00			43.83	
May							
31	66082	Net Cash (Joe Merrill)	85.90			129.73	43.83

[58]

These ledger sheets detail all cash and merchandise transactions. A notation shows the appropriation of payments to charges and the invoice number of each transaction. The exhibit shows 122 sales to the bankrupt with 24 credit entries, most of which are for money payments. Some represent discounts. Of the 122 items shown, I identify 25 as on account of goods used from consigned stock.

Plaintiff's Exhibit 2 was admitted in evidence. A copy of said Exhibit 2 is as follows: [59]

(Testimony of James H. Garrett.)

PLAINTIFF'S EX. 2
ASSIGNED ACCOUNTS OF HOUSE OF IRVING

MEMO ACCT.

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
JAN 1932						
29	J 637	Transfer from House of Irving a/c	2408.25			
FEB						
18	J 637	Transfer from House of Irving	286.00			
18	J 637	Transfer Payts House of Irving		55.00	2639.25	
24	R 562	By Payt O Garver		5.00	2634.25	2639.25
29	J 638	Correction on Transfer from House of Irving Under date of 1/29/32		.50	2633.75	
29	R 563	By Payt Gehres		41.00		2633.75
29	R 563	By Payt Horsfall		61.00	2531.75	
MAR						2531.75
1	R 563	By Payt Paddock		59.00	2472.75	
3	R 564	By Payt Williams		58.50		2472.75
4	R 564	By Payt Kaeding		50.00		
12	R 566	By Payt Rode		20.00		
14	R 566	By Payt Nickson		50.00		
16	R 566	By Payt Kyes		13.50		
16	R 566	By Payt M May		60.00	2220.75	
APR						
9	R 571	By Payt P Umoff		56.00	2164.75	2220.75
9	R 571	By Payt Chas Holcomb		5.00	2159.75	2164.75
9	R 571	By Payt M. Shindell		2.00	2157.75	2159.75
19	R 574	By Payt D. H. Nickson		50.00	2107.75	2157.75
22	R 574	By Payt L. S. Duryee		10.00		2107.75
26	R 575	By Payt O. E. Garver		10.00	2087.75	
MAY						2087.75
2	R 576	By Payt Geo Kadeing		15.00	2072.75	
11	R 576	By Payt Cora Rode		15.00	2057.75	2072.75
JUN						2057.75
2	R 582	By Payt Duryee		10.00	2047.75	
6	R 582	By Payt O Garver		5.00	2042.75	2047.75
13	R 584	By Payt Holcomb		5.00	2037.75	2042.75
23	R 586	By Payt Duryee		10.00	2027.75	2037.75

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1932						
JUL						2027.75
13	R 590	By Payt M. Kaeding		10.00	2017.75	
26	R 593	By Payt Sopwith		10.00	2007.75	2017.75
AUG						
13	R 596	By Payt C. F. Lester		50.00	1957.75	2007.75
SEP						1957.75
15	R 603	By Payt Corneliussen		5.00	1952.75	
28	R 606	By Payt L Wallace Holtz		16.00		1952.75
28	R 606	By Payt Kaeding		40.00		
28	R 606	By Payt Sopwith Holtz		10.00	1886.75	
OCT						
4	R 608	By Payt H. Lochow		28.00	1858.75	1886.75
19	R 612	By Payt S. Mountain Holtz		10.00	1848.75	1858.75
21	R 613	By Payt T S Allen		5.00	1843.75	1848.75
24	J 718	By Payt Col'n Exp Mountain		5.00	1838.75	1843.75
26	R 614	By Payt Sopwith Holtz		10.00	1828.75	1838.75
Dec 20	R 705	By Payt Sopwith		10.00	1818.75	1828.75
31	R 708	By Payt Dr. Corneliussen		3.00	1815.75	1818.75
Apr 14	R 735	By Payt Sopwith		10.00	1805.75	
June 21	R 756	By Payt Sopwith		11.50	1794.25	1805.75
Aug 14		By Payt Corneliussen		3.00	1791.25	1794.25
Sep 25	R 782	By Payt Corneliussen		3.00	1788.25	1791.25

[60]

Exhibit 2, supra, is a memorandum record showing the sum of $906.00 received by Kemp-Booth Company on accounts assigned by the bankrupt to the defendant.

PLAINTIFF'S EXHIBIT 3

was admitted in evidence. A copy of the exhibit is as follows:

(Testimony of James H. Garrett.)

"HOUSE OF IRVING
1325 4th Ave.
Seattle, Wash.
TRADE ACCEPTANCE MEMO ACCT.

Date	Description		Charges	Credits	Balance	Previous Balance
JUL 1931	T/A Date	Due				
	7/10/31	7/22/31	250.00			
		8/18/31	250.00		500.00	
JUL 22	T/A Paid			250.00	250.00	500.00
AUG 18	T/A Paid			250.00		250.00
SEP 22	T/A Date	Due				
	9/22/31	10/20/31	200.00			
		11/24/31	200.00			
		12/22/31	200.00		600.00	
OCT 20	T/A Paid			200.00	400.00	600.00
NOV. 24	T/A Paid			200.00	200.00	400.00
DEC. 22	T/A Paid			200.00		200.00
JAN 1932						
13	T/A Date	Due				
	1/13/32	1/29.32	200.00			
		2/20/32	200.00			
		3/15/32	200.00		600.00	
JAN 29	T/A Paid			200.00	400.00	600.00
FEB 20	T/A Paid			200.00	200.00	400.00
MAR. 16	T/A Retd			200.00		200.00

Exhibit 3 is a memorandum of trade acceptances given by the bankrupt and discounted by Kemp-Booth with its bank. The commission referred to in the contract was the usual 7 per cent discount applicable to all purchases paid for within ninety days. In only a few instances was it earned or allowed. On July 26, 1930, the bankrupt was indebted to Kemp-Booth on open account in the sum of $485.59. Part of the account was past due, though none of it was over 35 or possibly 40 days past due. Payments subsequently made [61] by the bankrupt were applied upon the oldest items, including the

original open account, or against merchandise used from consigned stock. Some of the credit entries upon the ledger account as indicated by notation were applied in payment of goods purchased outright, some in payment of goods used from consigned stock and some applied upon indebtedness prior to the consignment contract. The first payment made by bankrupt after the execution of the consignment contract was on September 12, 1930, in the sum of $163.02 and was applied to cover $153.68 worth of merchandise sold from consigned stock. The balance of approximately $10.00 was applied on the old account. The next payment was on October 9, 1930, in the sum of $149.19 and was applied against goods sold from consigned stock. A discount of $4.61 was allowed upon this payment and was applied upon the old open account. The next payment was on October 24, 1930, in the sum of $218.07 and was applied as against purchases of merchandise made on September 16 and 27. This apparently was an outright purchase though it is impossible to tell absolutely from the ledger. The next payment was made December 11, 1930, in the sum of $453.19 and was applied over a number of items, several being sales or invoices for merchandise sold under the consignment arrangement and was partially applied on the old open account. The next credit entry is for the sum of $38.00 which was for the return of a part of the merchandise a few days previous and which apparently had been

(Testimony of James H. Garrett.)

an outright purchase. The next payment was made on January 20, 1931, in the sum of $80.43 and apparently covered merchandise used from consignment. The next payment on March 12, 1931, in the sum of $150.00 was applied upon consigned merchandise. The next payment on March 19, 1931, in the sum of $274.27 was also applied on consigned merchandise. Each payment on an individual account was given an index number on our ledger and the number was [62] also set opposite the debit item so that at any time one can identify the items covered by particular payments. It is impossible, however, to identify absolutely from the ledger alone charges made for consigned merchandise, but because they are always billed cash 7 per cent, or net cash, while no other merchandise is billed that way, one can readily tell or readily suspect that the item is a charge for consigned merchandise, though this can be confirmed only by reference to the original invoices. The old open account was paid off by a final payment made July 10, 1931, on which date bankrupt owed Kemp-Booth for goods used from consigned stock and for goods sold, the sum of $1529.08. On January 10, 1932, the balance owing was $1344.26. During the year 1931 the balance due averaged approximately $1500.00. No accounts receivable prior to January 10, 1932, had been assigned to the defendant and but $38.00 worth of merchandise had been returned.

(Testimony of James H. Garrett.)

Before July 26, 1930, Kemp Booth had no goods on consignment with the bankrupt. When the consignment contract was entered into no separate account was made upon the ledger, but all money transactions were carried upon the same ledger account. No book entry was made when merchandise was sent to the bankrupt on consignment, but charges were made from time to time as the goods were actually resold by the bankrupt.

About 200 suit patterns worth two or three thousand dollars were delivered to the bankrupt under the consignment contract. Instead of requiring Mr. Irving to make up a report of sales in addition to an inventory on the first of each month, we by arrangement with him sent a representative to check the consigned stock approximately once each month to ascertain what had been disposed of. A memorandum would be made up of the merchandise sold and demand would be made on the bankrupt for payment. Even though the bankrupt did not pay for the merchandise used from consigned stock for six or [63] eight months after its use, no charge was entered against it on Kemp-Booth's books, but the bankrupt would know how much was owing Kemp-Booth from the memoranda supplied by Kemp-Booth and from its own accounts. We would then make demand on Mr. Irving for payment for that amount and when the amount was paid as it would be subsequently the regular invoice or bill would be written for that merchandise and entered

(Testimony of James H. Garrett.)

in our ledger account (Plaintiff's Exhibit 1) as was payment. The uniform discount on woolens was 7 per cent and there was no difference in the method of accounting for this discount before or after the date of the consignment contract. The only difference was in the dating of the invoices. On merchandise sold outright, the invoices were payable 30 to 120 days as might be agreed and the discount allowed if payment was made before the date named. On goods used from consigned stock the bankrupt was not entitled to the discount, though it may in some cases have received it. It would not receive it whenever six months or a year elapsed before payment.

It is the custom of woolen houses, including our own, to allow a 7 per cent discount for payment before an agreed date, but this discount is in no sense a commission. We never paid the bankrupt a commission.

On December 14, 1931, bankrupt paid to the defendant the sum of $200.00; on December 29, 1931, bankrupt paid to the defendant the additional sum of $200.00 and on January 20, 1932, bankrupt paid to the defendant the additional sum of $200.00. These payments were credited by the defendant upon bankrupt's open account.

(Testimony of James H. Garrett.)

On

Cross Examination,

in response to questions by Mr. Riddell, the witness states:

I have been in the woolen business eleven years. It is current practice with most all woolen houses to have their merchandise handled by tailors on consignment. Kemp-Booth in the past eleven years has had about 12 such accounts in Seattle. The practice was adopted by us after consultation with our attorneys [64] and was intended to protect us in carrying on our business in a lawful and orderly manner. We have handled all consignment accounts under a similar contract drawn for us by our attorneys. This consignment contract was handled no different from any other of our consignment arrangements.

The consignment contract was introduced in evidence as defendant's Exhibit 1, copy of which is set out in court's Memorandum Decision of April 7, 1934, page 14 supra.

After the execution of the contract, the course of business with reference to an outright sale of merchandise was to make out an invoice showing the manner of shipment, the price per yard and the total price of the shipment, such as defendant's Exhibit A-3, which is an invoice to the bankrupt on thirty days' net. Invoices on consigned goods when the same were reported sold by the consignee

(Testimony of James H. Garrett.)

bore the notation "memorandum," which in the woolen goods trade means "consignment." When goods left the defendant's place of business other than by sale, the transaction was recorded in a separate set of records. The original entry consisted of a memorandum of the shipment upon a separate form filed separately from the invoices and was a part of the stock and shipping department records and was not kept in the accounting department at all.

Exhibit A-5 is such a memorandum, showing 12 suit patterns delivered to the bankrupt at $4.87 per yard, without the total amount being extended. It bears the office notation showing that the shipment was entered upon our stock cards and that cards have been made for the customer's consignment account. There is no notation regarding entry upon our book account. This method of memorandum recording merchandise delivered on consignment is exactly the same as that used in keeping track of the movement of merchandise between our branch offices. [65]

When merchandise which has been sold is returned to us it is credited on merchandise sold outright and a credit memorandum is issued and credited upon our books.

Defendant's Exhibit A-6 is such a memorandum showing a credit to one Lindquist in the sum of $22.85.

(Testimony of James H. Garrett.)

When merchandise out on consignment is returned, as is frequently the case, because unless cut up into suits we may call for them any time we have a sale for them, a credit memorandum is issued for purchased merchandise, but bears a separate serial number and is not entered upon our accounting record, but is handled only by the stock record department and is designated as a consignment credit.

Defendant's Exhibit A-7 is a credit memorandum to the bankrupt on February 24, 1932, for a large quantity of merchandise consisting of 148 separate cuts listed by pattern numbers and yardage, without any notation of price or extension of total. A stock control record is kept at the Seattle office which shows an exact record of all merchandise whether in the Seattle stock, the Los Angeles stock, San Francisco stock, or in the hands of consignees.

Defendant's Exhibit A-8 and A-8-1 are cards identified by style numbers. They show the entire history of pattern number 8142 from the time received from the mills until disposed of.

Exhibit A-8 shows in the upper left hand corner the number of the suit pattern and then of the mill which produced the goods. It shows $4.00 as the original selling price per yard. In the first column is the customer's name and next the invoice or credit memorandum number. Some of these numbers refer to straight sales, some to consignments and some to transfers of merchandise between

(Testimony of James H. Garrett.)

offices. The next column shows the number of yards [66] received by us and the next the number of yards disposed of and the other column by subtraction shows the number of yards left in stock. The next column represents stock sent to San Francisco. Another column represents stock sent to Los Angeles. The column "S. F. memo" keeps account of any stock those offices sent out on consignment. Sales are shown in the first column marked "Yards delivered," and by the invoice number attached. A consignment from that stock is shown in the column farther to the right. On the first page of Exhibit A-8 none of the merchandise was consigned. It was sold or turned over to branch offices. On the second sheet, memorandum entry 7741-M shows the record of a delivery on consignment to a customer designated by the symbol "R." The customer did not dispose of the merchandise so we called it in and gave him credit and put it back in the Seattle stock. Later the exhibit shows on January 1, 1932, we delivered the suit pattern on consignment to the bankrupt where it remained several months and was later returned. In addition to the control stock card, Kemp-Booth kept a card for each length of woolens delivered on consignment. These are kept in a separate record place.

Exhibit A-8 and Exhibit A-8-1 is the control record of the stock and the supplemental record of consigned merchandise is a record kept by the consignees showing at all times exactly what stock is on

(Testimony of James H. Garrett.)

hand and what he is chargeable with. The consignment account with the bankrupt was designated by the letter "M." When a piece of goods was delivered to the bankrupt the stock record clerk made up a card from the memorandum of the shipment such as defendant's Exhibit A-5 and from that she made up the entries in the stock control record. If the shipment was a consigned account, she made a separate individual card for each separate piece of merchandise. For example, card No. 598 [67] shows that three and one-third yards of that pattern were delivered to the bankrupt on April 30, 1931, the price per yard being $6.37. By a date stamp on May 14, 1931, the card shows that we made an inventory check of the bankrupt's stock on that date and the parcel was still there. At some later date it was sold by the bankrupt and was invoiced to him by number 54714.

All such cards showing all transactions with the bankrupt are introduced as Defendant's Exhibits A-9-1, 2, 3. The invoices rendered would be somewhat subsequent to the sale by the bankrupt and would be on the date on which we secured payment. This card record would not show the date of sale by the bankrupt or the date upon which our representative first discovered on checking up that the item had been sold. Upon checking up, our representative, if he found an item still held by the bankrupt, would place a date stamp on the consignment card. If the check-up found that the

(Testimony of James H. Garrett.)

item had been sold he reported it to the stock clerk, who made a separate record. The foregoing method applied to the House of Irving and everybody else. The cards indicate six, eight or ten check-ups upon the inventory. Of the cards, group A-9 represent merchandise which had either been sold by the bankrupt and invoices issued by us or had been returned to us by the bankrupt prior to the termination of the consignment contract in the early part of 1932. Group A-9-1 represents the merchandise returned to us at the termination of the contract on February 24, 1932. Group A-9-2 represents merchandise returned to us within four months of the time when the accounts receivable were assigned other than the 148 patterns returned on February 24. Group A-9-3 represents items sold by the bankrupt on final check-up, that is, the balance of merchandise not returned to [68] us on February 24. These items we had previously recorded as consigned. They were subsequently invoiced to the bankrupt after taking the assignment of accounts receivable. Exhibit A-9-2 represents the items shown on the third page of Exhibit A to the answers to interrogatories. The dates of such returns are set out, the earliest being November 27, and the last February 2, 1932. Upon examining our records I now correct the statement made by me in answer to interrogatory No. 3, by the explanation that the first trade acceptance was paid by the bankrupt out of its own funds to the bank with

(Testimony of James H. Garrett.)

which we had discounted it. The second was paid by the $200.00 which we advanced for that purpose. The third was not paid and was charged back to us by the bank.

On

Redirect Examination

the witness testified:

In response to the demand of the plaintiff to produce records showing the sale, consignment or disposal of the 35 paterns mentioned by number, being the patterns used in the making up of suits included in the list of assigned accounts, I cannot state which of the pattern numbers represent cloth supplied by my company on consignment to the bankrupt as we have no record or any way of obtaining any information to whom our consigned goods were sold. The bankrupt did not furnish us, nor did we request a list of purchasers of suits made from our consigned goods. When the accounts were assigned to us we made no investigation to ascertain whether these accounts were for suits from our cloth. I do not know of my own knowledge that any assigned account was for suits made up from our consigned goods. Payments made by the bankrupt were by check or trade acceptance. I do not recall any cash payment. There was no agreement between ourselves and the bankrupt that it should keep segregated the proceeds derived from suits made up from our goods. I did not know and did not inquire [69]

(Testimony of James H. Garrett.)

whether the bankrupt was mingling the proceeds of the sale of the garments made from our goods with the proceeds of the sales from other goods. I made no inquiry into the handling of their funds in any manner. I was at their place of business infrequently, but am quite sure that they did not have exhibited upon the premises anything to indicate that they were agents of Kemp-Booth. That is a thing ordinarily kept covered up by the tailors. We considered it confidential to the two parties to the contract. If another woolen house dealing with the bankrupt had made inquiry from us whether we had goods on consignment in the hands of the bankrupt it would have depended entirely upon circumstances whether the information would have been given. No woolen house gives out that kind of information though it sometimes leaks out. I do not recall that we ever told anyone that we had goods on consignment in the possession of the bankrupt. I do not believe we were ever asked that question. There was no understanding with the bankrupt regarding what it should disclose or not disclose. I did not personally check up suit patterns with the bankrupt. We had a man whose duty it was to do so.

J. H. IRVING,

witness on behalf of the plaintiff, on

Direct Examination,

testified:

I was the president of the House of Irving, a Washington corporation, from July 26, 1930, to March 25, 1933. The corporation conducted a general tailoring business making suits on special order for our customers. In addition there was for a certain time a business conducted by me under the trade name of Fashion-Plus. Its assets were turned over in the bankruptcy proceedings because its accounts were so intermingled with the bankrupt's that it was impossible to segregate the same. The [70] bankrupt bought merchandise from various woolen houses and in July, 1930, it had eight merchandise houses and four or five trimming houses on its books. We closed our accounts with Kemp-Booth Company due to disagreement with Mr. Booth in 1926. ater in 1927 or 1928 we became friendly with Mr. Booth. In 1930 I met Mr. Booth in New York at his request. I was financially disturbed. I needed money and needed woolens. He said he would back me to a certain extent and for that reason I signed the contract. I was so badly involved I saw no way of getting out and I explained the situation to Mr. Booth. He and I had been in business together. He thought I had the ability to pull out. He said, "I will help you out." I said, "You must understand, Mr. Booth, I am in pretty bad shape." He says, " I realize all about it." I owed

(Testimony of J. H. Irving.)

$32,000.00 at that time. The accounts were past due. I was being pressed and harrassed until it was almost impossible to do any business. He said, "I will help you out on that. I will furnish you goods to the extent of $3,000.00. It will be put in a contract. That will give you a chance to get your breath and you can pay off some of those fellows who are after you the worst. * * * These goods will be consigned to you according to contract. You must live up to it." I says, "I will do the best I can. I will live up to that and I will take care of it." But business got worse instead of better. In 1931 I was in terrible bad shape again. I could not keep on going. Creditors were threatening me. They were going to close me up if I did not pay a certain amount. In February, 1932, I went to my attorney and he said, "I think the only thing you can possibly do is make an assignment. I made the assignment in February, 1932. I did not keep the agreement with Kemp-Booth to pay each month for the merchandise used during the preceding month. The only reason I did not do it was because I imposed on the good [71] nature of Mr. Booth. I had so many pressing debtors that I owed so I took their money and paid it to the very people you represent—took Kemp-Booth money and paid them and left Kemp-Booth holding the sack as they are holding it today." This was not consented to by Kemp-Booth. They told me I should pay them more; insisted upon my paying them more, but it was too late. Before making the con-

(Testimony of J. H. Irving.)

tract I had been buying goods from Kemp-Booth and I owed them something like four or five hundred dollars. After the contract was made this balance soon increased to approximately $1500.00. This ran up "very quickly, because I was badly harassed by people whose accounts were over-due." Just before the assignment was made three or four accounts were in the hands of attorneys for suit, but there were no accounts in the hands of attorneys for collection late in 1931. Between July, 1931, and January, 1932, Kemp-Booth frequently asked me for money according to the agreement and insisted upon my paying them. However, they carried me along hoping that if they did so I could get out of it. If you take the oldest bill it is perhaps true that I was behind approximately a year in payments due Kemp-Booth. But then the books would show "I was paying some on account from time to time. Of the stuff I had of theirs in my house, when I used their stock up I would pay for it because it was their goods." I discussed my financial condition two or three times with Mr. Booth or Mr. Garrett after making the consignment agreement.

> "Q. Were they aware of the fact that you were way behind with your other creditors?
>
> A. I wasn't so far behind with my other creditors, because I kept paying up. In the last twelve months I paid my creditors $6,000.00, so when this thing happened I was pretty close.

(Testimony of J. H. Irving.)

Q. There was $20,000.00 in claims filed and allowed as general [72] claims?

A. There shouldn't have been over $15,-000.00."

I made the assignment for the benefit of creditors because I was pressed by creditors holding open accounts which were just and due and I was told that I must pay or they were going to bring drastic action. My attorney advised me, "There is only one thing for you to do in the condition you are in." That there was no use paying three or four and leaving the remainder holding the sack. The assignment for the benefit of creditors was made about the last day of February, 1932. Shortly afterwards creditors proceeded with involuntary bankruptcy. Regarding the $100.00 check on November 30, 1931, I had given Kemp-Booth three trade acceptances. One was due and the bank, which was the holder, insisted upon payment. I explained to Mr. Garrett that I did not have the money and asked him to lend me the amount for a few days. He did so and I gave him my check. The $100.00 which he gave me with my balance was sufficient to cover the $200.00 trade acceptance at the bank. The three trade acceptances given on January 13, 1932, were not paid because of bankruptcy. Between November 22, 1931, and March, 1932, I returned to Kemp-Booth a large number of suit patterns which they claimed had been turned over to me on the consignment agreement. It was their merchandise and when the

(Testimony of J. H. Irving.)

matter came up they insisted upon its return. I did not return any pattern which I had received from them on open account or received from any other manner than under the consignment contract. I also assigned to them $2,684.00 of accounts. "The only house that I had a written contract for consigned goods with was Kemp-Booth; Ellison & Co. put goods in my house and Detner Company put goods in my house. I explained to those gentlemen any time they wanted the goods I would return [73] them or pay for them and along in January, 1932, I returned their goods. I paid them in full for anything and everything that I owed them on consigned merchandise. The only house that I did not pay was Kemp-Booth and the only reason I did not pay Kemp-Booth was because I didn't have the money nor could I get it and the next thing for me to do * * * was to give them as near as I could something representing cash and in doing that I took the accounts receivable and gave them those accounts. It was a voluntary act on my part because I thought it was the right thing to do to satisfy them as near as I could and frankly the only people holding the sack today is Kemp-Booth." My books show woolen in stock on December 31, 1929, amounting to $16,014.79. On December 31, 1930, we had in stock $11,930.64. On December 31, 1931, we had on hand $6,166.62. Plaintiff's Exhibits 7, 7-1, and 7-2 being statements of assets of the

(Testimony of J. H. Irving.)

bankrupt received in evidence do not include Kemp-Booth woolens claimed by them and later returned to them. The goods included are those bought and paid for on open account. The stock of Kemp-Booth goods carried by us at different times varied during the period covered by the consignment contract. Sometimes we would have quite a lot; other times not so many because they were coming and going all the time. At the beginning we got 35 or 40 patterns of three and one-third and three and one-half yards. They would ask us to return certain patterns if they were short and if our stock was depleted we would ask for others. Our consigned stock varied from time to time. At the time we returned the balance of the consigned goods I believe it amounted to some 160 suit patterns. The consigned stock during the period of the contract averaged between 150 and 200 suit patterns. At the time of the assignment in the latter part of February, 1932, the woolens on hand belonging to Kemp-Booth [74] were right up to the season. Of the goods which we had in stock, some were quite a number of years old, some even eight or ten years old. After making the contract with Kemp-Booth we bought very few pieces from other woolen houses. In reducing stock from $14,000.00 to $6,000.00 in two years the better patterns had been picked out, leaving the less desirable on hand. We adopted the policy of reducing the stock that belonged to us as fast as possible and not buying anything and reducing our indebtedness. In January and Febru-

(Testimony of J. H. Irving.)

ary, 1932, we probably reduced stock. The sales register would show. I do not think we had on hand as much as $6,166.62 of woolens at the time we assigned to creditors. In July, 1930, and shortly before making the contract with Kemp-Booth we were not able to pay bills promptly in the course of business. Mr. Booth knew that fact when the agreement was made. I went into detail with him at that time. As a rule, subsequent to July, 1930, we took care of bills as they fell due. We did not pay up our old debts. We would pay some on account and buy more. We were never on a cash basis. Sometimes we paid cash. When we got sixty or ninety days we took it. After July, 1930, we never succeeded in paying up our debts and there was approximately $15,000.00 of such debts at the time of the assignment. Within a few months prior to the assignment four creditors had placed their accounts in the hands of attorneys for collection threatening suit. I was not able to pay those accounts. Except for the aid Kemp-Booth gave me by furnishing the consigned stock and its leniency in requiring payment for goods used, I never would have been able to have continued in business during the year 1930. When I applied to Mr. Booth for help I explained the situation to him and showed him a statement. He understood the situation. Our books at the end of the year 1930 showed a loss of $13,957.76, or [75] over $1,000.00 a month, and the books also show a similar loss of $12,715.39 during 1931. I do not believe Mr. Booth knew any-

(Testimony of J. H. Irving.)

thing about our financial condition in January or February, 1932. I did not tell anyone connected with Kemp-Booth about the matter. I had a talk with Mr. Booth about the middle of February. "You see when Mr. Booth and I entered into the agreement for him to supply me with goods, I had to explain to him I was in financial difficulties and I also promised him that if he would put goods in my house I would see he would get those goods back in the event I got into difficulty with any other firm; that the goods were his and I would return them * * * and in 1932 in February * * * I went down to Mr. Booth's place and explained to him. He thought it was time for me to return the goods. It looked as though I was in trouble. He says, 'If that is the case, see that they are down here,' and I did. In this it was my idea to live up to my agreement with him in person, that I would deal with him the same as I would deal with any other house I got goods from, either to return the goods or pay the money." I did not have the funds with which to pay Kemp-Booth in cash and so returned the goods. The return of the goods and the assignment of the accounts which he accepted at face value I believe just settled their account. The assignment to creditors was made on February 28, 1932, which was within a few days after the return of the goods to Kemp-Booth. The whole thing happened within four or five days—the whole business; the notice from the attorneys and the assign-

(Testimony of J. H. Irving.)

ment was made within, I think, four days. I do not know whether I told Mr. Booth, but at that time we intended to assign for the benefit of creditors. Some of the goods, 12 pieces, were returned before I went to our attorney and some a few days later. I knew at the time I turned the goods back that I had to quit business because of the pressure of other creditors. Our place of business was at 1323 Third Avenue near Union Street. It was 90 by 21 feet. The patterns were on racks displayed in three and one-third yard lengths on open shelves. [76] Some goods were displayed in the window. We did not keep the goods furnished by Kemp-Booth absolutely separated from other stock. We tried to keep them separate, but in handling and putting them back they would get mixed up. Once in a while we would go through them and every week we checked up. In showing goods we did not tell the customers whether the goods came from Kemp-Booth or elsewhere. A ticket attached to one end of the bolt of goods shoved into the roll told where it came from and when it was received. The ticket on goods received from Kemp-Booth would have the initials "K. B." upon it, the pattern number, the yardage and as a rule the price per yard in code. All woolen houses put such tags on their goods when they send them out. The tag did not show whether the goods had been sent on consignment, an outright sale or bought on credit or whether paid for or not. We did not make a practice of exhibiting the tags to

(Testimony of J. H. Irving.)

customers. We never called the attention of a customer to the fact that Kemp-Booth claimed a lien upon the goods until they were paid for. The customer knew nothing about our business, where we got the goods or anything connected with it. We did business exclusively in the name of House of Irving. Neither letter-heads nor bill-heads stated that we were agents of Kemp-Booth or their representative. About 50 per cent of the business was credit. Cash received from suits was deposited in the bank to the credit of the House of Irving. We had no separate bank account in which we kept money in trust for Kemp-Booth. For suits sold on credit we billed the customer on a House of Irving bill-head. Moneys coming in on suits made from Kemp-Booth material went into our general bank account. In this bank account we mingled the proceeds of all sales of clothing whether made up from Kemp-Booth goods or otherwise. The money that came in was ours. Payment of running expenses, rent, salaries, [77] labor, payments to other creditors and to Kemp-Booth came out of this account. There was no sign anywhere about the place of business indicating that we were agents or consignees of Kemp-Booth. We told no customers or creditors that we held goods on consignment. If they knew it they must have found out elsewhere. I considered all business transactions confidential. I did not regard the agreement as secret because I got goods from other houses in the same way. I did not con-

(Testimony of J. H. Irving.)

sider it necessary to give the public or my creditors any information regarding my business. I did not sell any of the suit patterns. They were not mine to sell. Though the contract in clause nine provides that I had the right to sell suit patterns at certain prices to be furnished from time to time by Kemp-Booth Company Limited, I do not understand that I had any right to sell woolens. I think I had the right to sell woolens to be made in suits of clothes, but not as a piece of woolen. The contract no doubt reads that I have the right to sell suit patterns, but I interpret the meaning of the contract to be that I could not sell any of their materials; that is, to sell it as material, because that was their business. I was not supposed to sell woolens and did not, either of theirs or any other. I was in the tailoring business and did not sell woolens to anyone. I never sold any of Kemp-Booth Company's woolens. I acted entirely under the tenth clause of the contract which gave me the right until otherwise directed to make up any part or parts of merchandise into garments. We made up no suits until we had orders. We had no ready-made business. In every case the customers selected the goods and we designed the suit, fitted it and made it for him. On delivery of the suit to the customer we treated the sale as closed and entered it upon our books. Woolen for a suit is cut into 22 or 23 pieces. After it is cut up it is [78] no good to anyone else. There would be a great deal of loss sustained, practically

(Testimony of J. H. Irving.)

the value of the piece of woolen, if the customer did not accept the suit. In making the suit we use in addition to the woolens other items called tailors' findings or trimmings. There would be practically as many separate parts of these as of the woolens. Prices on suits ranged from sixty to one-hundred and fifteen dollars. The woolen cost five, seven or ten dollars a yard, depending upon materials. About one-fourth or one-third of the price is represented by the cost of the woolens. Twenty-five Dollars worth of woolens would take $6.00 worth of trimming and $35.00 labor cost. The suit would sell for $100.00. The woolen going into a suit would not ordinarily constitute more than one-third of what the consumer paid for the suit. We never made a report of our sales of suits to Kemp-Booth, neither a list of customers nor the price of the sales. They never asked us to do so. From time to time we furnished an inventory of the merchandise remaining on hand and belonging to Kemp-Booth, but a man connected with their business checked up once a month. We would then take down every bolt of the stock out of the shelves and check each piece of cloth. That was necessary to get a thorough check-up. If any was missing we would refer to the sales record showing what had been sold. This would determine how much I owed them. In order to keep my books straight, I would ask them to give me a memorandum of the goods I had used. I would then debit myself with that and this would be the first entry

(Testimony of J. H. Irving.)

on my books with reference to consigned woolens. Up to that time I had kept only a memorandum of the goods delivered. Plaintiff's Exhibits 6-1 and 6-2 are two pages of bankrupt's ledger showing the Kemp-Booth account. A copy of Exhibits 6-1 and 6-2 are as follows: [79]

Sheet No. 3 Account No. 1

KEMP BOOTH LIMT.

Seattle

Date		Folio	Debits	Balance	Credits	Folio		Date
1929								1929
Dec. 31	Adj.	(g)	52.13		95.85	1504	Bill 6/1	June 3
					42.50	1517	7/13	July 13
					7.67	1525	8/5	Aug. 5
					27.42	1527	8/17	" 17
					46.67	1527	8/19	" 19
					45.13	1532	9/3	Sept. 4
					9.17			
					22.92	1538	9/23 9/26	" 26
					14.50			
					52.13	1541	10/1 10/1	Oct. 3
					53.64	1541	10/3	" 3
					19.50	1542	10/7	" 8
					22.92	1545	10/16	" 16
					26.44	1556	11/15/29	Nov. 16
					17.19			"
					22.92	1556	11/19 11/19	" 19
					20.83	1562	12/6	Dec. 7
					16.88	1565	12/16	" 17
					32.66	1567	12/22	" 24
					17.00			
Dec. 31	Balance		568.19		6.38	1567	12/23 12/24	" 24

Date		Folio	Debits	Balance	Credits	Folio		Date
								1930
Mar. 5	Bills 6/1/29 to 10/1/29	1592	319.70		568.19	Balance		Jan. 1
June 16	Chk. 422	1617	282.99		19.13	1572	Bill 1/13	14
July 10	" 473	1627	164.67		30.42	1579	Bill 2/10	Feb. 11
" 10	Discount	"	8.67		19.58	1583	" 2/20	" 20
Sept. 3	Chk. 49	1642	152.26		19.58	1586	" 3/3	Mar. 3
" "	Discount	1642	13.94		36.09			
					30.94	1597	" 3/17 3/17	Apr. 15
					32.08	1597	" 3/31	" 15
					200.91	1602	Apr. bills	Apr. 30
					149.22	1610	May "	May 31
					35.04	1618	June "	June 30
					135.49	1629	July "	July 31
					153.68	1636	Aug. "	Aug. 31
Oct. 22	Chk. 125	1648	218.07		229.60	1636	Bill 7/31	Aug. 31
" 8	" 107 Oct. bills	1648	134.27		149.19	1643	Sept. bills	Sept. 30
" 8	Discount	"	14.92		218.07	1647	Trimmings	Oct. 22
Dec. 10	Chk. 210	1659	351.48		77.85	1649	Oct. bills	" 31
			11.06					
" 31	Discount on chk. 210	1661	15.69		68.76	1655	" cash bills me.	Nov. 20
1931					88.28	1655	Nov. " "	Nov. 29
Jan. 17	Ck. 254	1666	72.40		253.45	1655	" reg. "	" "
" "	Discount Dec. bills	1666	8.03		109.45	1661	Dec. " "	Dec. 31
" 31	Cr. bill 1/19	1667	38.00		80.43	1661	" cash " me.	Dec. 31
Mar. 12	On a/c ck. 393 Jan.	1675	150.00	1028.77	11.06	1661	Disc. not allowed	" "

1931									
Mar. 18	Ck. 410 bal. Jan. bills	1676	231.85		160.75	1667	Jan. reg. bills	1931 Jan. 31	
" 18	Dis. on ck. 410	1676	42.42		424.27	1667	" 10% "	" "	
					92.34	1672	Feb. reg. "	Feb. 28	
" 29	3 bills 4/16	1682	134.18		459.43	1682	Apr. bills	Apr. 30	
May 9	Chk. 480	1686	100.00		104.99	1684	Bill 5/14/31	May 14	
" 9	" 489	1686	84.60		363.09	1688	May bills	May 31	
" 9	" 490	1686	6.50		161.90	1692	June "	June 27	
June 8	" 534	1693	196.63		138.92	1678	Mar. "	Mar. 31	
" 8	Discount	1693	66.01	1803.84	105.85	1698	Memo a/c June	July 22	
May 11	"	1686	35.42	1768.42	197.97	1698	Reg. Bills July	" 29	
July 13	Trade Acc.	1698	250.00		97.21	1703	Reg. " Aug.	Aug. 29	
								[80]	
					15.42				
July 13	Memo bills June	1699	95.26		151.67	1706	Memo a/c Aug.	Sept. 28	
							Sept.		
Oct. 20	Trade Accept	1713	200.00		114.30	1714	Oct. bills	Oct. 31	
Nov. 23	2nd " "	1718	200.00		10.00				
					95.42	1716	Bills 11/18	Nov. 23	
Dec. 14	A/c	1723	200.00		100.00	1716	Loan a/c	" 25	
" 29	"	1724	200.00		49.21	1718	Nov. bills	" 30	
31	Balance		2430.70	2430.70	870.49	1724	Dec. "	Dec. 31	
					2430.70				
Dec. 31	Balance		2634.65		203.95	Sup	F. P. acct.	Dec. 31	
1932								1932	
Jan. 22	Check 813	1729	200.00		2634.65		Balance	Jan. 1	
Feb. 15	Error & ret. goods	1731	209.95		460.15		Misc. bills	Feb. 15	
Jan. 29	Act. recd — 1	1729	2408.25						
Feb. 18	" " 1	1731	286.00						
			3104.20		3094.80				

[81]

(Testimony of J. H. Irving.)

Anything shown on the record as purchased prior to 1930 was a cash item. The first purchase indicated was in 1929. The account was open and running at the time the consignment contract was made. Down to the date of the consignment agreement, I was buying goods from Kemp-Booth in a very small quantity on a 30 day account. The ledger account does not show cash purchases, but includes items purchased from Kemp-Booth on credit and items used from consigned stock. When they checked up and sent a memorandum of consigned goods used the amount would be credited to them on this account. Payments made to Kemp-Booth were likewise entered on this account and this is the only account on my books of merchandise consigned by Kemp-Booth. If a suit was made up and refused by the customer, we paid Kemp-Booth for the woolens. If I used the goods I paid for them and if the customer who got the suit failed to pay, it was my loss. I was supposed to pay at the end of the month for materials used during the month. If a customer failed to pay when due Kemp-Booth did not extend the time. They knew nothing about my affairs in that respect nor did anyone else. Every few days suit patterns would be returned and exchanged. We never assigned to Kemp-Booth our interest in a suit made up. We never reserved with the customer a lien in favor of Kemp-Booth. We never delivered any finished suits to Kemp-Booth, nor did they ever claim such suits under paragraph 10 of the contract. The only accounts ever assigned to

(Testimony of J. H. Irving.)

Kemp-Booth were those assigned just before the assignment for the benefit of creditors was made. I segregated the accounts so assigned. I offered to assign all accounts receivable. Mr. Booth rejected this and said he wanted only accounts that came from Kemp-Booth goods according to the contract. The accounts I assigned either had the number of goods on the original order or for some reason I believe they were made up from Kemp-Booth goods. When the customer ordered a suit, we did not sell him the goods separately and con- [82] tract to make it up for him, but sold him a suit to be made from a particular pattern. The Commission agreement referred to in paragraph three of the contract was never carried out. We owed Kemp-Booth for the goods and we acknowledged that they had a right to the accounts until they got the money. On the accounts that would accrue from selling their materials we acknowledged that they had an equity in every sale that was made to that extent and that extent only. No commission was ever allowed, paid, or mentioned. The contract requires fire and burglar insurance. I took out fire insurance for myself, but not for them, and explained it to them at the time. I carried no burglar insurance.

Upon Mr. Riddell producing an insurance policy in response to plaintiff's notice to produce, and same being handed to the witness, the witness testified:

I identify the policy of insurance introduced as Exhibit 9 dated August 20, 1930, as one taken out by me upon clothing and material at 1325 Fourth

(Testimony of J. H. Irving.)

Avenue in the sum of $3,000.00 insuring the House of Irving, loss, if any, payable to Kemp-Booth as its interest might appear; otherwise to the insured.

Witness is then shown several letters marked Plaintiff's Exhibit 10 for identification, and testifies:

Those are letters written by me as president of the House of Irving to one of our creditors, Gerhardt, Katz & Wankanski. That shows what I was going through for about a year, robbing one man to pay another.

Plaintiff's Exhibit 10, the letters referred to, was admitted in evidence and made a part of the record herein. Omitting the formal and immaterial portions, said letters contained the statements by the bankrupt concerning the condition of the business and his inability to meet his obligatons at the several [83] dates following:

> January 15, 1931—We note your remark about drawing on us. Please do not do this, for the reason that we would be compelled to return it if you do.
>
> May 15, 1931—I realize the condition of our account and believe me if there is any way possible I am going to pay it as soon as I can. The facts of the case are, Pete, I am behind in my bills all the way from a year to two years and am just being hounded to death for payment, that with the condition of business and trying to keep going, it doesn't leave much to pay on

(Testimony of J. H. Irving.)

old accounts, and that means I'll have to quit and if I quit I suppose I will go to jail.

June 15, 1931—I have just been notified by the Pacific National Bank that our balance Saturday did not provide for payment of the check I gave to you and that they returned the check to you.

July 15, 1931—I regret to tell you it is impossible to send a check at this time, but you may depend upon our helping you out in the near future. The first money I get will be sent to you.

August 12, 1931—Your letter requesting a check received this morning, and I regret it is impossible to send you a check at this time.

September 15, 1931—I have your letter of the 10th asking for a remittance on account. Just at this time it is impossible to send anything. The months of July and August were terrible as far as business was concerned, but it is picking up a little now, and between the two companies I should be able to send something to you.

November 13, 1931—You have a check of mine coming due on the 15th and it was understood at the time I gave it to you that you would hold it and advise me before sending it through. Please hold it over a few days longer, as it is impossible for me to meet it at that time. I hope to have some money the latter part of the week and will send you some then.

(Testimony of J. H. Irving.)

Upon

Cross Examination

by Mr. Riddell, the witness testified:

When the assigned accounts were turned over to Mr. Booth he told me he wanted only accounts for suits made up from consigned goods. Some patterns received from Kemp-Booth on consignment were sent out as display samples to associated tailors. I think Kemp-Booth knew of this, but I am not sure. I think a few patterns were not returned from Yakima and Long View. During this same period we had goods on consignment from Detmer Woolen Co. and from Ellison & Co. and a few from Fisher & Sons. When we got into [84] financial trouble the goods belonging to Detmer Woolen Company were returned. We also returned the goods to Ellison & Co. I paid the difference between the amount of the goods received from them and the amount returned. When goods were received from Kemp-Booth Company, tags were attached bearing Kemp-Both Company monogram. In checking up, the tags attached identified the goods. The policy of insurance was turned over to Kemp-Booth Company at once and has remained in their possession ever since.

Upon

Re-Direct Examination

by Mr. Rice, the witness testified:

Referring to the assigned accounts, the first account, that of Keith-Atkins, was made up from cloth

(Testimony of J. H. Irving.)

marked N. E. N., so marked because the original ticket was lost. I could not say for sure that this was from Kemp-Booth goods, but I am of the opinion that it was and that is the reason it was included in the assignment. The next account, that of Thomas Allen, was made up from consigned stock of Kemp-Booth Company. The next account, E. L. Brackett, represents a suit delivered April 9, 1929. The account of Dr. Cornelisen was for a suit made up from a memo goods of Ellison & Co. for which I paid them. I am not sure whose goods were used in making up the suit upon which the account of Asahel Curtis was based. The account of J. C. Dumett I would not be certain about until I had looked up the records, but the account being dated prior to the consignment contract could not have been based upon Kemp-Booth consigned goods, though the suit may have been made up from Kemp-Booth materials bought on open account and not paid for. The account of Duyree does not represent Kemp-Booth goods. It antedates the consignment contract and could not possibly be based upon Kemp-Booth consigned [85] goods. The A. G. England account was made up from Kemp-Booth consigned goods, so also was the next account, namely that of C. G. Evans.

JAMES H. GARRETT,
recalled,

testified that he had checked over the assigned ac-

(Testimony of James H. Garrett.)

counts during court intermission and had found that twelve of these accounts originated from suit patterns consigned by Kemp-Booth Company; that defendant's Exhibit A-11 sets out a list of assigned accounts, the name of the customer, the amount of the account, the total payment and the balance due on the account, together with the amount paid on those accounts identified as based on merchandise consigned by Kemp-Booth with the value of the cloth contained in the suit; that the total payments on each account is shown, but not the detail; that the schedule shows the pattern numbers which were furnished by the plaintiff. The last column totaling $227.33 shows the value of the cloth in each suit on which any payment was received, except in the case of the Allen account upon which only $5.00 was collected; that the list contains 35 consigned accounts, of which 12 are based upon woolens consigned by Kemp-Booth; that payments have been made upon nine of these accounts and the sum of $444.50 collected thereon. Of the 12 accounts based on Kemp-Booth goods the cloth was worth $227.23. On these 12 accounts $444.50 was collected. On three of the accounts no collections have been made. That the face value of all the accounts assigned did not balance the amount due Kemp-Booth by $129.73.

ARCHIE TAFT,

witness for the plaintiff, on

Direct Examination,

testified that he was employed by Seattle Broadcasting Company in 1930, 1931 and 1932; that he sold bankrupt advertis- [86] ing space on which the Broadcasting Company had a claim of $285.00 and that the claim was subsequent to the date of the consignment contract.

Thereupon Mr. Riddell stipulated that there were subsequent creditors.

JAMES O'CONNOR,

witness for the plaintiff, on

Direct Examination,

testified that he was agent for Metropolitan Building Company, owner of the store building leased to the bankrupt; that he was frequently at the bankrupt's store; that he did not know that the bankrupt held any goods on consignment from Kemp-Booth Company and never saw or heard of anything suggesting such a consignment. That when the goods were removed from the store there was $2331.89 due on account of rent and services.

That thereupon it was stipulated that the Post Intelligencer handled advertising for the bankrupt during the period covered by the consignment contract and was without any knowledge of the consign-

(Testimony of James O'Connor.)

ment and has a claim against the bankrupt in the sum of $647.13 and that the Seattle Times has a similar claim for $463.20.

J. L. GALVIN,

witness for the plaintiff, on

Direct Examination

testified:

That he was trustee for the bankrupt; that he had extended in red pencil the prices of suit patterns on Exhibit A attached to the interrogatories to the total value of $2,478.34; that he had formerly been manager of Arnstein-Simon Co., a wholesale woolen house doing business at Seattle and San Francisco; that from 1914 to 1931 Arnstein Simon & Co. sold lots of goods on open account to the bankrupt and that in July 1930, there [87] was past due on this account and notes given for a total of approximately $3,900.00; that at no time after July, 1930, did the bankrupt pay debts as they fell due; that Mr. Irving in October, 1930, gave witness a statement showing assets of $44,942.00 and liabilities of $18,229.00 and said that practically all of his accounts were past due. His woolen stock he gave as $16,234.00. He did not mention that he held goods on consignment, nor did anything about his place of business so indicate; again in October, 1931, witness obtained a statement from Mr. Irving who said that

(Testimony of J. L. Galvin.)
his total indebtedness was then $12,665.00 and that Kemp-Booth was on the list for $1,762.00; that all assets of the bankrupt except a few accounts receivable have been reduced to cash, amounting to $4751.82; that general claims total $18,555.00; that a 4 per cent dividend has been paid and another 4 per cent dividend is probable.

On

Cross Examination,

the witness testified that about 120 suit patterns were recovered from various parties, some of which have been Kemp-Booth goods; that all woolens coming into the possession of the trustee were sold to the highest bidder under the direction of the Referee for the appraised value.

DEFENDANT'S TESTIMONY

JAMES H. GARRETT,

recalled, testified on

Direct Examination

for the defendant as follows:

That he has examined Exhibit A-12, being the list of woolens recovered by the trustee from Mr. Merrill of Longview and finds that all of the list consists of Kemp-Booth woolens. For the last three years at least Mr. Booth has been in Connecticut [88] and has been here only at intervals. All that time I have been in charge of Kemp-Booth Com-

(Testimony of James H. Garrett.)

pany on the coast. I did not know until long after the bankruptcy proceedings that the goods had been sent to Merrill for display. That plaintiff's Exhibit 1 is the Kemp-Booth ledger sheet of its account with the bankrupt. In July, 1930, at the time of the consignment contract, the bankrupt's open account showed a balance of $485.00 for purchases from April 11, 1930, to July 18. Maturity on the items ranged from June 1 to September 1. Of the $485.00, approximately $127.00 was not yet due. Payment for the remainder had just matured. After the execution of the consignment agreement, the course of dealing was as follows: On July 31, we sold the bankrupt on open account $229.60 of goods. Up to the time of the consignment contract the bankrupt's limit of credit with us was $750.00. After the consignment contract we extended this credit limit to $3,000.00. On August 31, the account for outright purchases amounted to $746.00. On September 1, the first report of consignment sale was made amounting to $153.00. On the same day we received payment in the sum of $163.00, which involved a credit of $10.00 on the old account. By October 7, purchases on open account totaled $1,101.81. On this date the second consignment settlement was made with the charge of $149.19 which was paid two days later and left the balance all on open account due from the bankrupt $951.01. Open account items had increased to $1028.00 on October 24, when $218.67 was paid and credited on open ac-

(Testimony of James H. Garrett.)

count. There was no charge against the bankrupt for consigned merchandise at that time. No money was then due us for consigned merchandise. On November 4 a charge for consigned goods was made and later paid. On December 11, the open account stood at $922.00, on which date there was no item owing for con- [89] signed merchandise. On December 31, we checked the consignment and entered a charge of $80.43, which was paid in January. The open account then stood at $1086.00. Similarly, check-ups of the consigned account were made on February 5, paid in March; April 17, paid by May; May 15, paid June 9; July 13 and September 17. On January 13, 1931, after receiving three trade acceptances of $200.00 each, the balance due on open account stood at $744.26. After the consignment contract business with the bankrupt on open account largely increased. He owed bills, but this was chronic. We learned of the failing condition of the bankrupt after the middle of January. The merchandise returned by the bankrupt on consignment account was when received worth approximately 50 per cent of the value originally memoed to the bankrupt. Prices had dropped materially. The value of the accounts received which were transferred to us was from 33 1/3 per cent to 45 per cent of the face value. The understanding regarding commissions with the bankrupt was that it should retain as its compensation the difference between sale prices and the cost of the materials, making and overhead. I do not know of any particular in which

(Testimony of James H. Garrett.)

the consignment contract was deliberately violated. We at all times tried to exact absolute compliance. Payments made by the bankrupt on open account and for consigned merchandise amount to $2718.76; $143.28 was allowed in discounts, of which all but $23.03 was for discounts on consigned merchandise, because the open purchase accounts were not paid for within the discount period, where as the consignment accounts were paid for within the period allowing the discount. In the latter part of January Mr. Irving told Mr. Booth that he was pressed by creditors until he could not go further. I said that the consignment arrangement must be terminated and the unsold merchandise returned and settlement made for merchandise [90] used from the consignment. Mr. Irving said that he could not pay the latter, but had accounts receivable arising from the sale of our merchandise. We therefore insisted that he assign to us sufficient of these accounts to cover the debt owing, making it specific that we wanted only accounts arising from the sale of our own goods. I first learned that some of the assigned accounts did not arise from the sale of our merchandise yesterday in court. We had no means of checking up as the records were in the hands of the trustee.

On

Cross Examination,

the witness testified:

The 7 per cent discount is not the commission mentioned in the contract, but simply a discount for

(Testimony of James H. Garrett.)

cash payment. The net profit he made on a suit was to be the commission. We never paid him any commission; it was not contemplated. The patterns on display with Merrill were not charged to the bankrupt until May 31, 1933, after we had discovered what had become of them. Upon taking back the merchandise we did not credit the bankrupt with anything. No money values entered into the consignment account. Though we knew the assigned accounts were not worth over 33 1/3 per cent of their face, we credited the full amount to the bankrupt. We understood that when the consignment account was placed in Mr. Irving's store it belonged to us; that Irving might sell a suit cut from the goods and deliver the suit to his customer; that when the suit was so delivered to his customer we did not own the suit. We made no claim to the suit, but had a claim against him for the value of the goods. When we got back the 160 patterns we entered them in our stock cards. The merchandise taken back was not sold in one lump, but such part as we may have sold was sold by the piece. It will be impossible from our records to [91] trace the goods returned by the bankrupt.

By stipulation between counsel it was agreed that the 160 suit patterns returned to Kemp-Booth Company Limited within four months prior to the filing of the petition in bankruptcy were worth $1652.23, which amount was 66 2/3 per cent of their original value.

(Testimony of James H. Garrett.)

Subsequent to the trial of this action, the defendant on November 3, 1934, in open court executed and delivered to the plaintiff a re-assignment of the uncollected balances of all accounts based upon suits made up from goods not supplied by the defendant. Three accounts for suits made up from goods supplied by the defendant were, however, not re-assigned.

I, the undersigned, United States District Judge, do hereby CERTIFY that I presided at the trial of the above entitled cause; that the foregoing statement consisting of 41 pages, including the page upon which this certificate is executed, is hereby settled, allowed, and approved by me as a true, complete and properly prepared statement in condensed form of all of the evidence introduced at the trial of said cause.

Dated at Seattle, Washington, this 4th day of February, A. D. 1935.

EDWARD E. CUSHMAN,
United States District Judge.

Copy received Jan. 22, 1935.
EARL G. RICE and
McCLURE & McCLURE,
Attorneys for Plaintiff.

[Endorsed]: Lodged Jan. 22, 1935.
[Endorsed]: Feb. 4, 1935. [92]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Edward E. Cushman, District Judge of the United States District Court for the Western District of Washington, Northern Division:

The above named defendant feeling aggrieved by the decree made and entered in this cause on the 8th day of November, 1934, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herein and prays that its appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, and desiring to supersede the execution of said decree, petitioner herein tenders bond in such amount as the court may require for such purpose and prays that with the allowance of the appeal a supersedeas be issued.

RIDDELL & BRACKETT,
Attorneys for Defendant. [93]

The foregoing petition is granted and appeal therein prayed for allowed and shall operate as a supersedeas upon the petitioner filing a bond in the sum of Five Thousand Dollars, with sufficient sureties to be conditioned as required by law.

Done at Tacoma, Wash., this 6th day of December, A. D. 1934.

EDWARD E. CUSHMAN,
Judge United States District Court, Western District of Washington.

Copy received Dec. 3, 1934.

EARL G. RICE (Per W. E. McC)
McCLURE & McCLURE,
Attys. for Plaintiff.

[Endorsed]: Dec. 3, 1934. [94]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant and says that the decree entered in the above cause on the 8th day of November, 1934, is erroneous and unjust to the defendant for the following reasons, which the defendant assigns as error:

I.

The court erred in not finding that the goods delivered by the defendant to the bankrupt were delivered upon consignment only, title remaining at all times in the defendant.

II.

The court erred in holding that the delivery of the goods to the bankrupt by the defendant constituted a sale thereof and that the return of a part of said goods and the assignment of accounts and

the payment of cash to the defendant was not an accounting due to the defendant upon consigned goods, but a preference.

III.

The court erred in refusing to find that the goods returned by the bankrupt to the defendant were goods belonging to the defendant; that they were in the possession of the bankrupt on consigned account only and that title to the same at [95] all times remained in the defendant.

IV.

The court erred in refusing to find that accounts transferred by the bankrupt to the defendant were transferred pursuant to the requirements of a consignment contract, whereby title to the said goods and the proceeds thereof remained in the defendant and that the said transfer was not a preference, but was lawfully and properly made as an accounting of defendant's goods sold from consigned stock by the bankrupt.

V.

The court erred in refusing to find that moneys paid by the bankrupt to the defendant were not paid as a preference, but were paid upon an accounting of the proceeds of goods owned by the defendant and held by the bankrupt on consignment only.

VI.

The court erred in refusing to enter a decree dismissing the bill of the plaintiff.

WHEREFORE, defendant prays that said decree be reversed and an order be entered directing the dismissal of the bill of the plaintiff.

Dated at Seattle, Washington, this 3rd day of December, A. D. 1934.

RIDDELL & BRACKETT,
Attorneys for Defendant.

Copy received Dec. 3, 1934.

EARL G. RICE (Per W. E. McC)
McCLURE & McCLURE,
Attys. for Plaintiff.

[Endorsed]: Dec. 3, 1934. [96]

[Title of Court and Cause.]

APPEAL AND SUPERSEDEAS BOND.

Know All Men by These Presents:

That we, KEMP-BOOTH COMPANY, LTD., a corporation, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto J. M. GALVIN, Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt, in the full and just sum of FIVE THOUSAND DOLLARS, for the payment of which well and truly to be made we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twelfth day of December, 1934.

WHEREAS, the above named KEMP-BOOTH COMPANY LTD., a corporation, is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered in the above entitled action under date of November 8, 1934. Now, therefore, the condition of this obligation is such that if the above named Kemp Booth Company Ltd., a corporation, shall prosecute its appeal to effect, and answer all damages and cost if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue. [97]

[Seal] KEMP-BOOTH COMPANY LIMITED,
By J. H. GARRETT,
Secretary-Treasurer.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By JAMES A. CATHCART,
Attorney in Fact.

Approved.

EDWARD E. CUSHMAN,
Dist. Judge.

State of Washington,
County of King—ss.

On the Twelfth day of December, 1934, before me personally appeared J. A. Cathcart, to me known to be the Attorney in Fact of the Fidelity and Deposit Company of Maryland, the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and

voluntary act and deed of said corporation for the uses and purposes therein mentioned and on oath stated that he was authorized to execute said instrument and the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] CHARLES H. SHERIFF,
Notary Public in and for the State of Washington, residing at Seattle.

United States of America,
State of Washington,
County of King—ss.

On this 12th day of December, A. D. 1934, before me personally appeared J. H. GARRETT, to me known to be the secretary-treasurer of KEMP-BOOTH COMPANY, LIMITED, the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes there- [98] in mentioned and on oath stated that he was authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] S. M. BRACKETT,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Dec. 13, 1934.

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL.

Citation on appeal having been signed and entered herein on the 6th day of December, 1934, and it being impossible to procure the settlement and approval of the evidence herein prior to the return date named in the said citation, good cause having been shown and upon stipulation of counsel hereto appended, it is

ORDERED that the time within which Kemp-Booth Company Limited, a corporation, appellant herein, may file the record in this cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be and the same is hereby extended to the 18th day of Feby., 1935.

Dated at Tacoma, Washington, this 2nd day of January, A. D. 1935.

EDWARD E. CUSHMAN,

Judge United States District Court for the Western District of Washington.

[Endorsed]: Filed Jan. 2, 1935. [99]

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto that the foregoing order may be entered.

EARL G. RICE (W. E. McC)
McCLURE & McCLURE,
Attorneys for J. M. Galvin, as Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt.

RIDDELL & BRACKETT,
Attorneys for Kemp-Booth Company Limited, a corporation.

[Endorsed]: Filed Jan. 2, 1935. [100]

[Title of Court and Cause.]

PRAECIPE.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

PLEASE CERTIFY to the United States Circuit of Appeals for the Ninth Circuit transcript of the following pleadings and papers:

1. Bill of Complaint.
2. Answer.
3. Court's Memorandum Decision of April 7, 1934.
4. Findings of Fact and Conclusions of Law entered, except the contract set out in paragraph 13 thereof, in place of which contract there shall appear the notation, "Here is set out the contract of July 26, 1930, copy of which appears in the

Court's memorandum decision of April 7, 1934, supra."

5. Supplemental Finding of Fact No. 1 entered.

6. Supplemental Finding of Fact No. 2, entered.

7. Defendant's Proposed Findings of Fact and Conclusions of Law, except the contract which appears in paragraph 8 thereof, in place of which contract there shall appear the notation, "Here is set out the contract of July 26, 1930, copy of which appears in the Court's memorandum decision of April 7, 1934, supra."

8. Defendant's Exceptions to Findings of Fact and Conclusions of Law entered and exceptions to Court's refusal to enter Defendant's Findings and Conclusions.

9. Decree entered November 8, 1934.

10. Defendant's exception to decree.

11. Statement of the Evidence (when settled and certified).

12. Petition for Appeal.

13. Order on same.

14. Assignments of Error.

15. Citation.

16. Bond.

RIDDELL & BRACKETT,
Attorneys for Defendant.

Copy recd.
EARL G. RICE, 12/21/34.
EWF

[Endorsed]: Filed Dec. 21, 1934. [101]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, EDGAR M. LAKIN, Clerk of the above entitled court do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 101, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the decree of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit: [102]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 253 folios at 15¢	$37.95
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Total	$43.45

I hereby certify that the above cost for preparing and certifying record, amounting to $43.45 has been paid to me by the attorneys for the appellant.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 6th day of February, 1935.

[Seal] EDGAR M. LAKIN,
Clerk United States District Court for the Western District of Washington,
By TRUMAN EGGER,
Deputy. [103]

[Title of Court and Cause.]

CITATION ON APPEAL.

UNITED STATES OF AMERICA TO J. M. GALVIN, as Trustee in Bankruptcy of the House of Irving, Bankrupt, and to EARL G. RICE, Esquire, and MESSRS. McCLURE & McCLURE, his attorneys:

YOU AND EACH OF YOU ARE NOTIFIED that in a certain case in equity in the United States District Court for the Western District of Washington, cause No. 939, wherein J. M. Galvin, as trustee in Bankruptcy of the House of Irving, a corporation, bankrupt, is plaintiff, and Kemp-Booth Company Limited, a corporation, is defendant, an appeal has been allowed the defendant therein to

the United States Circuit Court of Appeals for the Ninth Circuit.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in said court at San Francisco, California, thirty days after the date of this citation to show cause if any there be why the decree appealed from should not be corrected and speedy justice be done to the parties in that behalf.

DATED at Tacoma, Washington, this 6th day of December, A. D. 1934.

[Seal] EDWARD E. CUSHMAN,
Judge United States District Court, Western District of Washington.

Copy received Dec. 6, 1934.
EARL G. RICE,
McCLURE & McCLURE,
Attys. for Pltff. [104]

[Endorsed]: No. 7768. United States Circuit Court of Appeals for the Ninth Circuit. Kemp-Booth Company, Limited, a Corporation, Appellant, vs. J. M. Galvin, as Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 8, 1935.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7768

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KEMP-BOOTH COMPANY LIMITED,
a corporation,

Appellant,

vs.

J. M. GALVIN, as Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt,

Appellee.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

MESSRS. RIDDELL & BRACKETT,
1121 Smith Tower,
Seattle, Washington,
Solicitors for Appellant,

MR. EARL G. RICE,
1012 Lowman Building,
Seattle, Washington,
Solicitor for Appellee,

MESSRS. McCLURE & McCLURE,
905 Lowman Building,
Seattle, Washington,
Solicitors for Appellee.

PIONEER PRINTING CO., SEATTLE, WASHINGTON

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No. 7768

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KEMP-BOOTH COMPANY LIMITED,
a corporation,

Appellant,

vs.

J. M. GALVIN, as Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt,

Appellee.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

This is an appeal from a decree in favor of J. M. Galvin as trustee in bankruptcy of the House of Irving, a corporation, vs. appellant, Kemp-Booth Company Limited, allowing a recovery for alleged unlawful preferences (R. 53). Appellee sued to recover three items of alleged unlawful preferences. The first item was for $700.00 received by appellant

from the bankrupt within four months of the bankruptcy. The Learned Trial Court allowed a recovery of $600.00 upon that item. The assignment of errors (R. 112-113) raises no issue in this court upon the accuracy of the decree upon that item. The other two items upon which the suit was brought are, however, questioned on this appeal. The second and third items upon which the trustee in bankruptcy sued (R. 3 and 4) were for the recovery of accounts receivable aggregating a face value of $2,694.25 (R. 3) and the recovery of woolen suitings of an alleged value of $3,500.00 (R. 4). Appellant admitted receiving assignments of accounts from the bankrupt and also the receipt of woolen suitings (R. 8) but pleaded affirmatively that the assigned accounts arose from the sale of woolen suitings and that the merchandise recovered was other woolen suitings, the property of appellant, which it had delivered to the bankrupt pursuant to a consignment contract in which the title to the goods and the proceeds thereof to the extent of the value of the woolens in the account, remained in appellant and that therefore the said materials were not a part of the bankrupt's estate (R. 10, 11, 12). The consignment contract is set out in full (R. 14-16) in the decision of the Learned Trial Court, who held that:

"With the tenth provision in this contract the transaction was one of sale and not consignment." (R. 21.)

The terms of the contract are as follows. It is dated July 26, 1930, between Kemp-Booth Company Limited, a corporation, as first party, and House of Irving, a corporation, as second party.

1. First party agrees during the life of the agreement to consign from time to time such of its goods to second party as are suitable for sale for first party by second party.

2. The value of said goods in the possession of second party shall at no time exceed $3,000.00.

3. Second party shall receive such commission for selling the same as may be stipulated by first party.

4. Second party shall account to and settle with first party on the first day of each and every month during the life of the agreement at the sale price fixed by first party for all merchandise covered by the agreement sold during the previous month, less commission. Second party guarantees the collection and prompt payment on the first day of each month of the sale price of all merchandise sold during the previous month.

5. Second party shall furnish first party a monthly inventory of the exact merchandise held by it for first party on the first day of the month, beginning September 1, 1930.

6. Second party shall insure all the merchandise against loss by fire and burglary in policies running to first party and keep the merchandise segregated from other merchandise on the premises.

7. Either party may terminate the agreement by giving three days' written notice and at termination all of the goods of the first party in the possession of second party shall be returned to first party.

8. First party shall have the right to check up and inspect and/or withdraw any or all of the merchandise at any time without notice.

9. The title to all such consigned merchandise shall remain in the party of first part and second party shall have no title thereto, but the right to sell the same for first party under the terms and conditions stated. Prices and terms on which the same may be sold are to be furnished from time to time by first party.

"10. The party of the second part shall have the the right, until otherwise directed in writing by the

party of the first part, to make up any part or parts of said merchandise into garments, but in such case the title to all such garments shall remain in the party of the first part; and on the sale of any and all such garments the party of the second part shall receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise." (R. 14-16.)

It is the foregoing paragraph which in the opinion of the Learned Trial Court rendered this transaction "one of sale and not consignment." (R. 21.)

Findings of Fact were signed by the court in accordance with his decision (R. 22-31). Appellant proposed findings upon its theory of the case (R. 35-45) and duly excepted to the findings made and refused (R. 34, 46-52). Whereupon an appeal was taken to this court (R. 111-122).

In the lower court (and we assume in this court) appellee also contended:

1. That creditors subsequent to the date of the contract of consignment on July 26, 1930, were ignorant of the same and that it was therefore a fraud upon them.

2. That where alleged consignee may sell at his own price, being bound to pay for the goods at a fixed price, the transaction is a sale.

3. That the failure to require the proceeds of the sales to be held as trust funds is fatal to a consignment arrangement.

4. That failure to keep the consigned goods separate is fatal to the consignment.

5. That payment by the alleged consignee of insurance is a badge of a sale and not a consignment.

6. That the alleged consignment agreement was not lived up to and was therefore fraudulent as to creditors, in that

(a) The bankrupt did not account monthly on the first of the month;

(b) It did not furnish an inventory of the exact merchandise held by it on the first of each month;

(c) The bankrupt did not cover the consigned merchandise with burglary insurance; and

(d) That (in line with the holding of the Learned Trial Court) the cutting up of the woolens and its manufacture into suits destroys the con-

signed merchandise and constitutes a sale to the bankrupt.

ASSIGNMENTS OF ERROR.

The case is before this court on six assignments of error (R. 112-113), which raise the simple question whether the consignment contract before set out really creates an agency and not a sale and if so, whether appellant has committed any act thereunder which estops it from contending that the relationship was one of agency.

DISCUSSION OF THE FACTS.

While we believe the record in relatively unimportant particulars contradicts Mr. Irving, the president of the bankrupt, who testified for appellee, still in the main the record is free from contradictions in any important matter.

It is current practice with most all woolen houses to have part of their merchandise handled by tailors on consignment. Appellant in the eleven years preceding this trial had about twelve such accounts in Seattle. Its consignment practice was adopted after consultation with its attorneys. All such accounts have been handled under a contract upon the form which was introduced in evidence in this case. The consignment contract with this bank-

rupt was handled no different from any other of the consignment arrangements of appellant with other tailors (R. 72). The bankrupt during the same period had goods on oral consignments from three other woolen houses. Just prior to the bankruptcy the bankrupt returned the consigned goods to the other woolen houses (R. 84, 89, 100). The record does not disclose a suit by appellee for the recovery of any other consigned goods.

The head office of appellant is in Seattle with branch offices in San Francisco and Los Angeles, which also send goods out on consignment (R. 75). The Seattle office keeps a control record in the form of index cards of every bolt of woolens received. The card contains the number of the pattern and the number of the mill which produced the goods, together with the original selling price per yard and the number of yards received in the bolt (R. 74), When goods are sold from the bolt the number of yards in the sale is recorded on the card, a subtraction made and the number of yards left in stock is shown (R. 75). When, however, goods are sent out on consignment and not by sale or when stock is forwarded to the San Francisco or Los Angeles houses of appellant, a separate column is used for each (R. 75). Each customer to whom goods are sent

on consignment is given a letter. The bankrupt's letter was "M" (R. 76). When a consignee disposed of the goods the subtraction was then made. When the San Francisco or Los Angeles house sent out goods on consignment that was reported to Seattle and on the control card there was then noted, for example, "S. F. memo." (R. 75). If the tailor to whom the suit pattern was sent on consignment did not dispose of it, it might be called back, a record made on the control card and then it might be sent out to another tailor or, of course, sold outright.

So that the control record of the particular bolt at all times showed the amount of the pattern on hand, the amount which had been sold and the location of each suit pattern which had been cut off of the bolt and which had not been sold (R. 74-75). In addition to the control stock card appellant kept a card for each length of woolens delivered on consignment. These cards were kept in a separate place (R. 75).

Upon a monthly check-up of the consigned merchandise when it was found that the tailor had sold a suit pattern, the same was then charged upon a regular invoice (R. 76) posted in the ledger (R. 60-64) and reported to the stock clerk, who made her record of the disposition of the suit pat-

tern. The foregoing method applied to the bankrupt and to all other consignees (R. 77). Consigned merchandise is frequently returned and when that occurs the record of the goods in the possession of the consignee is credited with the return of that particular suit pattern by the stock record department, but no accounting record is made. If the returned merchandise was goods which had been sold outright, a credit memo was, of course, issued (R. 74). Paragraphs 4 and 5 of the contract (R. 14-15) required the bankrupt to account to and settle with appellant on the first of each month, and to furnish an inventory of the exact merchandise held by the bankrupt for first party. Appellee objects that no such practice occurred. What did happen was that by subsequent arrangement with the bankrupt, appellant sent a representative each month to check the consigned woolens to ascertain what had been disposed of, upon which occasion a memorandum was made of the merchandise sold and demand made on the bankrupt for payment (R. 70). Manifestly, this method would compel the bankrupt to observe the contract better than would adherence to the practice fixed by the contract. The clerk who checked the stock in the possession of the consignee would report by stock number the items which he found in

the possession of consignee. A clerk in the stock record department of appellant took the individual suit pattern cards of the woolens which were in the possession of consignee and by use of a date stamp indicated upon that card that that particular suit pattern was still in the possession of consignee. All such cards showing all transactions with the bankrupt were introduced in evidence (R. 76). So that upon the card index record of each particular suit pattern its history in the possession of consignee could at all times be ascertained. On each monthly check-up it would be found to be there and when it was missing the *del credere* factor under the fourth paragraph of the consignment contract (R. 15) was then billed for the merchandise. The record of financial transactions with consignees who received goods bought on direct sale and on consignment was for practical reasons kept in one account. Appellant's account with the bankrupt is set out in *haec verba* (R. 56-64).

Prior to the execution of the consignment contract on July 26, 1930, there had been trouble between appellant and the bankrupt (R. 80.) Up to that time the bankrupt's limit of credit had been $750.00 (R. 106). His open account then stood at $485.59. When the consignment contract was exe-

cuted his credit limit on straight sales was extended to $3,000.00 (R. 106). The consignment contract (R. 14) provided that the limit of the consigned goods to be placed in the possession of bankrupt was $3,000.00.

Of the 122 items shown on the ledger account of appellant with the bankrupt (R. 60-64) Mr. Garrett, secretary-treasurer of appellant, identified 25 of the 122 items as being on account of goods sold from consigned stock (R. 64). This identification was made by the fact that the charges made for consigned merchandise are always billed, "cash 7 per cent," or, "net cash," while no other merchandise is billed that way (R. 69).

When a payment was made to appellant by a customer it was given a payment number and the application of the payment upon the debit side of the ledger was shown by also writing that payment number against the particular item or items to which the payment was applied. These payment numbers will be found to the left hand side of the column headed "charges" and to the left hand side of the column headed "credits" in Exhibit 1 (R. 56-64). Exhibit 1 shows that 24 numbered payments were made by the bankrupt from the beginning of his account in 1926. The first payment after the con-

signment account was made (R. 60) is payment No. 7 on September 12, 1930.

Identifying the charges and payments for the sale of consigned goods by the bankrupt in accordance with the testimony of Mr. Garrett and checking the same against Exhibit 1 we find that the consigned merchandise was charged and paid for as follows:

RECORD OF CONSIGNMENT CHARGES AND PAYMENTS.

Date of Charge	Amount	Date of Payment	Payment No.
9-12-1930	$153.68	9-12-'30	7
10- 7-1930	149.19	10- 9-'30	8
11- 4-1930	68.76	12-11-'30	10
12-10-1930	88.28	12-11-'30	10
12-31-1930	80.43	1-20-'31	11
2- 5-1931	424.27	3-12-'31 (150.00)	13
		3-19-'31 (274.27)	14
4-16-1931	65.00	4-29-'31 (136.60)	15
	254.61	5- 9-'31 (100.00)	16
	34.59	5-11-'31 (111.10)	17
		5-12-'31 (6.50)	18
5-15-1931	73.34	6- 9-'31	19
7-13-1931	105.85	7-10-'31	20
9-17-1931	151.67		
	15.42		
10-13-1931	47.92		
11-18-1931	95.42		
	10.00		
2-12-1932	1096.94		
	253.62		

Appellee contends that the consigned merchandise was not kept segregated from the other goods of the bankrupt as provided in the sixth paragraph

of the contract (R. 15). When consigned goods were delivered to the bankrupt each piece contained a tag bearing the Kemp-Booth Company monogram so that in checking them up the tags identified the goods. This ticket on the goods which was shoved into the end of the bolt of goods contained the initials "KB," the pattern number, the yardage and as a rule the price per yard in code. The bankrupt tried to keep these goods separate, but in handling and putting them back they would get mixed up. Once in a while the bankrupt would go through them and every week it checked up (R. 88, 100).

The record discloses that no inquiry was ever made by any creditor regarding the existence of the consignment agreement (R. 79) and while the agreement was not secret because the bankrupt had consigned goods from other houses in the same way, it is apparent that no voluntary disclosure of any of its consignment arrangements was made by the bankrupt (R. 89- 90).

While the merchant tailoring business is of such universal notoriety that the court would undoubtedly take judicial notice of its salient features, still the record does show the method in which the woolen goods in question was merchandised. The bankrupt never sold a suit pattern as such. No suit was made

until the bankrupt had an order for it. In every case the customer selected the goods, whereupon the bankrupt designed the suit, fitted it and made it for the customer. Upon delivery of the suit to the customer the sale was treated by the bankrupt as closed and was entered upon its books. Woolen for a suit is cut into 22 or 23 pieces and thereafter it is no good to anyone else (R. 90). In addition to the woolen suiting the tailor used fittings or trimming of which there would be as many separate pieces as there would be of woolens. Twenty-five dollars worth of woolens would take $6.00 worth of trimmings and a labor cost of $35.00. The woolen going into the suit would not ordinarily constitute more than one-third of what the customer paid for the suit (R. 91). The stock of consigned goods with the bankrupt varied; because they were coming and going all the time. Appellant often asked for the return of certain patterns and if the stock of the bankrupt were depleted it would ask for others (R. 85). Every few days patterns would be returned and exchanged (R. 96).

Paragraph six of the contract (R. 15) required the bankrupt to keep the consigned merchandise covered with fire and burglary insurance, policies running to appellant. The bankrupt had no burglary policy, but took out a $3,000.00 fire insurance

policy, loss, if any, payable to Kemp-Booth as its interest might appear (R. 97-98). It was turned over to appellant at once and has remained in its possession ever since (R. 100).

In his statement of assets at the close of the years 1929-1930 and 1931, the bankrupt's books showed a stock of woolens on hand (in round numbers) of $16,000.00, $12,000.00 and $6,000.00 respectively, none of which included the Kemp-Booth woolens consigned by them and later returned to them (R. 84-85).

The business of the bankrupt became bad and in the latter half of 1931 appellant continued to insist upon payments according to the agreement, but the bankrupt was unable to pay (R. 81, 82).

Mr. Booth had been east for three years prior to the trial, during which time Mr. Garrett has been in charge of the business of appellant (R. 105, 106). He testified that he knew of no particular in which the consignment contract was deliberately violated and that at all times appellant tried to exact absolute compliance therewith (R. 107-108). The bankrupt deposited moneys which it received from the sale of suits to customers in its bank account. Payment of running expenses, rent, salaries, labor, pay-

ments to other creditors and to appellant came out of that account.

Late in January, 1932 (R. 108), a check-up of the bankrupt's consigned accounts was made and it was then discovered that $1,096.94 worth of woolens were unaccounted for, entry of which was made on February 12, 1932 (R. 64). Except as will be pointed out in a moment no explanation of this shortage of materials of appellant has ever been offered. An examination of the account (R. 60-64) will show that it was impossible for that amount of merchandise to have been used since the last check-up on the 18th of November, 1931. The president of the bankrupt testified (and this is evidently where some of the merchandise was concealed), that he sent out some consigned patterns "as display samples to Associated Tailors. I think Kemp-Booth knew of this, *but I am not sure.*" (R. 100.) During the trial it was brought out that some of the woolens of appellant had been sent to a tailor named Merrill at Longview, Washington, concerning which Mr. Garrett said: "I did not know until long after the bankrupt proceedings that the goods had been sent to Merrill for display." (R. 106.) Whether some of appellant's goods disappeared by going to other tailors on display or by an act even more deliberate,

or whether clerks of appellant had not kept accurate check, there is no evidence in the record. Appellant's entire records of this transaction were produced on the trial and no sinister inference suggested in them nor in examinations of Mr. Garrett.

Late in January, 1932, the bankrupt disclosed to appellant that he could go no further. The consigned merchandise was returned to appellant and the bankrupt transferred to appellant accounts receivable to satisfy its open account against him (R. 108). Appellant insisted at the time that it should receive only those accounts which arose from the sale of its consigned goods and appellant was advised by the bankrupt at the time that the accounts which appellant received were those which arose from the sale of suits made from consigned goods (R. 108, 97). It was disclosed upon the trial, however, that that was not correct (R. 101), a fact which appellant first learned upon testimony to that effect by the president of the bankrupt (R. 108), as appellant did not have possession of the records of the bankrupt and could not check them up (R. 108). Mr. Garrett did check them during the trial, however (R. 102). On the accounts of bankrupt which had thus been assigned to appellant, appellant collected $905.50 (R. 25). Upon checking the records

of bankrupt during the trial Mr. Garrett discovered that of the 35 assigned accounts, only 12 arose from the sale of suits which were made from consigned merchandise, but the total collected thereon was $444.50 and that the consigned value of the cloth in these suits was $227.23 (R. 102). Upon the close of the trial appellant executed to the trustee in bankruptcy an assignment of all of the accounts which were still uncollected except three which arose from the sale of suits which were made from consigned merchandise (R. 110). During the trial it was stipulated that the value of the consigned merchandise which appellant received in January, 1932, was $1,652.23, which was 66⅔ per cent of its original value.

Thereupon findings and exceptions were made and a decree was entered by the court requiring the transfer to the trustee of three accounts still uncollected and giving judgment against appellant for the three items sued upon in appellee's complaint, together with interest upon each item to the date of judgment, to-wit:

(a) Six Hundred Dollars received by appellant in cash or by its bank in payment of trade acceptances within four months of the bankruptcy. The accuracy of this portion of the judgment is

not raised by the assignments of error upon this appeal.

(b) For the $905.50 which had been collected by appellant upon the assigned accounts, which includes the $227.23, the value of the consigned cloth represented in those accounts.

(c) Sixteen Hundred Fifty-two and 23/100 Dollars, the stipulated value of the consigned merchandise at the time of its return to appellant.

Section 3790 of Remington's Revised Statutes of Washington requires a conditional sale contract to be filed in the office of the County Auditor within ten days from the delivery of personal property sold on conditional sale. Sections 3781 and 3788 thereof require a chattel mortgage to be so filed within ten days from its execution. The consignment contract in question in this case was never so filed (R. 28, 29.) Appellant concedes that it received the merchandise and assignments of accounts within four months of the bankruptcy. As before stated, the Learned Trial Court held that paragraph ten of the contract in question made the contract one of sale. Appellee not only so contends, but also contends that other elements of the contract also made it a contract of sale and not one of consignment and

that appellant had violated the contract in such a manner as to indicate that it was a fraud upon creditors of the bankrupt. By reason of the lack of time to file a reply brief, appellant is compelled in this brief to answer those contentions of appellee of which appellant has any intimation. It is our contention that appellant was entitled to receive back its own consigned goods and to retain $227.23, the value of its materials which went into the assigned accounts.

ARGUMENT UPON THE LAW.

The Learned Trial Court set out the tenth paragraph of the contract as follows:

> "TENTH: The party of the second part shall have the right, until otherwise directed in writing by the party of the first part, to make up any part or parts of said merchandise into garments, but in such case the title to all such garments shall remain in the party of the first part; and on the sale of any and all such garments the party of the second part shall receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise."

and held:

> "With the tenth provision in this contract the transaction was one of sale and not consignment." (R. 21.)

The Learned Trial Court cites four decisions in support of his opinion. The first is that of Judge Story in *Buffum vs. Merry,* (1824) 3 Mason 478, Fed. Case No. 2112, 4 Fed. Cas. 605. That was a case in which the owner of yarn delivered it to a manufacturer of cloth at the price of 65 cents per pound to be paid for in manufactured plaids at 15 cents per yard, the manufacturer agreeing as nearly as he could to use the plaintiff's yarn in making the plaids and to use for filling other yarn of as good a quality. Upon a contest between the former owner of the yarn and the creditors of the cloth manufacturer, Judge Story very properly held that the former owner of the yarn could never compel its return, but could only demand *in exchange therefor* plaids at the rate of 15 cents per yard to equal the value of the yarn at 65 cents per pound. Judge Story said:

> "Cotton yarn was here bargained for plaids, to be delivered at a future time at certain stipulated prices. When the bargain was completed by delivery of the yarn, the property in the latter passed to Hutchinson."

In the next case cited by the Learned Trial Court, *Commissioner of Internal Revenue vs. San Carlos Milling Co.,* (1933) 63 Fed. (2) 153, Your Honors were considering a contract between a Phil-

ippine sugar cane planter and a manufacturer of sugar. The planter, together with other planters similarly situated and operating under similar contracts, delivered cane to the manufacturer to be made into sugar. "It would not be commercially practicable to extract the sugar from each planter's cane separately." (Page 155.) By sampling the planter's cane, the sugar content was determined and upon completion of any particular milling operation the amount of sugar resulting from any particular planter's cane was ascertained. By the contract 40 per cent thereof belonged to the mill and 60 per cent thereof belonged to the planter. Thereupon a weight certificate evidencing the pounds of sugar which belonged to the planter in the fungible mass was issued to the planter and the mill always retained sufficient sugar on hand to deliver upon demand all of the sugar called for by the outstanding receipts. Your Honors held that that contract was a consignment agreement and not a sale. The Learned Trial Court could not have had in mind the decision of this court that the transaction was a bailment, but must have had in mind the language which Your Honors quoted (page 154) with approval from *Corpus Juris:*

> "Where articles are delivered by one person to another who is to perform labor upon them or to manufacture them into other articles for the former, the transaction is a bailment notwithstanding the articles are to be returned in altered form. But if the person by whom the articles are received may deliver in return articles which are not the product of those received the transaction is in effect a sale. * * * But it has been held that the transaction is not converted into a sale by reason of the fact that the manufacturer is to receive a share in the manufactured article by way of compensation."

Borman vs. U. S. (2nd Circuit Court of Appeals, 1919) (the third case cited by the Trial Court), 262 Fed. 26, was a criminal prosecution against the defendants for conspiracy to defraud the United States in the embezzlement of linings which had been furnished the defendant Borman by the United States under a contract whereby Borman was to use the linings in the manufacture of leathern jerkins for the United States. The defense was that at the time the defendants appropriated the linings to their own use the title in the linings had passed to the defendants and was not in the United States. The gist of the decision is contained in the following quotation (pp. 29-30):

> "It is elementary that where articles are delivered by one person to another, who is to perform labor upon them or to manufacture them into other articles for the former, the trans-

action is a bailment; but if the person who receives the articles may deliver in return articles which are not the product of those received, the transaction is in effect a sale. Now it is not necessary to inquire, for reasons which will presently appear, whether under the provisions of the contracts herein involved the delivery of these linings involved a bailment or a sale, whether the contractor was bound to use the linings which the Government delivered, or whether other linings might have been used in their stead. * * * But for the purpose of argument we shall assume that under the contracts there was a sale of the linings and not a bailment. Then the question arises whether or not under the sale the title had passed to the linings herein involved.

This court had under its consideration in *Re Liebig,* 255 Fed. 458, 166 C. C. A. 534, the question as to the time when title passes under a sale. We said in the case cited that in sales the transfer of the title depends upon the intention of the parties however indicated. And in *Hatch vs. Oil Company,* 100 U. S. 124, 25 L. Ed. 554, the general rule was said to be that the agreement as to the passing of title is just what the parties intended to make it, if the intent can be collected from the language employed, the subject matter and the attendant circumstances. We think the intent of the parties to these two contracts is clearly indicated in the language they employed.

The provision already referred to which provided that the contractor was to be liable to the United States for any loss of or damage to any of the materials furnished by it would seem to indicate that the title to the property *continued* in the Government and had not

passed to the contractor .

* * * * * * * *

Moreover, it was provided, as we have seen, that 'all rags and clippings from the linings "shall remain" the property of the United States,' that is to say, the title in the rags and clippings must under this language have been all the time in the United States.

* * * * * * * *

Assuming then, a sale, it is clear that the title could not have been intended to pass until the linings were cut out, and then only as to so much as were used in the jerkins."

So that whether the transaction is or is not a sale and whether the title to the goods does or does not pass is a question of the intention of the parties as gathered from the instrument even where the Government was to furnish the lining and buttons only, the contractor to furnish all other materials and was to be paid at a stipulated price for the leather jerkins which the contractor was to manufacture.

We submit that if it was proper in the *Borman* case to examine the contract to determine the intent of the parties that an examination of the contract in question will disclose that in this case nothing was ever to be returned to the consignor except:

(a) The identical goods which were consigned,

or

(b) The proceeds of a sale by a *del credere* factor after transfer of the title to the ultimate purchaser.

Even if the *Borman* case be regarded as an authority that when the woolen suitings delivered to the bankrupt in the instant case were cut off and manufactured into a garment, that title to the woolen suiting had then passed to the bankrupt, the *Borman* case is still an authority that until the suitings had been cut up there was no sale. The Circuit Court of Appeals in the *Borman* case say (p. 30):

> "Moreover, as it was never cut, but remained in the form in which it was received, no title passed, and it continued to be the property of the Government."

The last case cited by the Learned Trial Court as authority for his conclusion that the tenth paragraph of our contract rendered the transaction a sale is *Baltimore & Ohio R. R. Co. vs. Western Union Telegraph Company* (District Court, S. D. New York, 1917), 241 Fed. 162, 170. In that case the Railroad Company and the Telegraph Company by a written contract had agreed to an "exchange of services." The court quoted from *Buffum vs. Merry, supra,* the definition of sale or exchange

given by Judge Story in the following language (p. 170):

> "What is a sale or exchange? Blackstone says it is a transmutation of property from one man to another in consideration of some price or recompense in value. If it be a commutation of goods for goods, it is more properly an exchange."

It is evidently the foregoing language on account of which the Learned Trial Court cited the *Baltimore & Ohio Railroad Company* case and it must be that the court felt that the purpose of the tenth paragraph of our consignment contract was the "commutation" of our woolen suiting for the completed garment, because the title to the garment was reserved in the consignor. It is true that language to that effect does appear in paragraph ten, but even if paragraph ten be taken bodily out of the contract and be considered without any reference to the rest of the contract that paragraph goes on (R. 16):

> "And on the sale of any and all such garments, the party of the second part shall receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise."

Appellee well urged in the lower court and the

record shows that after the suit was cut up for the particular customer, "it is no good to anyone else." (R. 90.) The purpose of the reservation of title in the consignor was not in order that the consignor might sell the suit in the usual course of trade; its sole purpose was to protect the consignor in the value of the consigned merchandise with the intent that the title to the garment should be immediately transferred by the tailor as the agent of the consignor to the ultimate purchaser, the consignor thereby retaining title to the proceeds of the sale and permitting the consignee to "receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein."

In fact, if the contract had provided that upon the manufacture of the suit the title to the manufactured garment passed to the tailor to be by him transmitted to the ultimate purchaser, the contract instead of being a contract of consignment and agency would have been a contract with an option to purchase. If this contract is invalid then it is not possible for wholesale woolen houses to consign their merchandise to merchant tailors.

The Learned Trial Court in his findings (R.

28-29) cites the Washington statutes which require the filing for record of conditional sale contracts and chattel mortgages. Appellant concedes that this contract was never so filed. Therefore, if it is construed as being either, appellant has no standing in this court. There is, however, no provision of Washington law which requires the filing or recordation of a consignment contract and the Washington court has held that, consequently, such filing or recordation would not afford constructive notice of its existence.

Its last decision is in *Flynn vs. Garford Motor Truck Co.,* (1928) 149 Wash. 264, 270; 270 Pac. 806, 808, where the court says:

> "This court has held that, in the absence of a statute authorizing the recording of an instrument of a certain character, the recording of such an instrument does not operate as constructive notice. *Howard vs. Shaw,* 10 Wash. 151, 38 Pac. 746; *Fischer vs. Woodruff,* 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742; *Dial vs. Inland Logging Co.,* 52 Wash. 81, 100 Pac. 157."

DISCUSSION OF THE ELEMENTS OF A CONSIGNMENT.

This portion of the brief will be devoted to a very brief discussion of the elements of a consignment contract upon which no appellate court re-

quires any assistance; followed by a discussion of those elements which appellee may contend deprive the contract in the instant case of its character as a consignment agreement.

Discussion of the Contract as a Contract of Consignment.

The contract expressly reserves in the consignor title to the consigned merchandise and constitutes the merchant tailor as the agent of the consignor in the disposition of the property. That a contract of bailment may contain additional provisions which enlarge the legal responsibility of the bailee is well settled.

> "A bailee may, however, enlarge his legal responsibility by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking."
>
> *Sturm vs. Boker,* (1893) 150 U. S. 312, 330; 37 L. Ed. 1093, 1100.

This consignment agreement is therefor valid unless destroyed as such by some added feature. The Learned Trial Court construed the tenth paragraph of the contract as constituting a sale. That paragraph, however, gave the tailor merely an option to cut up the merchandise into suits for sale

to a particular customer whose body the suit was made to fit.

In our opinion the Learned Trial Court committed error in failing to recognize that where the State law has created a rule of property, that that rule will be binding upon the Federal Courts. He failed to give effect to the law of Washington that the delivery of personal property with an option to purchase does not constitute a conditional sale contract. We most respectfully urge that he also failed to recognize that the same principle of law obtains in the Federal Courts.

We know of no dissent from the holding that a rule of property determined by State law is binding upon the Federal Courts.

> "Whether and to what extent a mortgage of this kind is valid is a local question, and the decision of the state court will be followed by this court in such case."
>
> *Thompson vs. Fairbanks,* (1904) 196 U. S. 516, 522; 49 L. Ed. 577, 585, approved in
>
> *Humphrey vs. Tatman,* (1904) 198 U. S. 91, 92; 49 L. Ed. 956, 957.
>
> "The nature of transaction, that is to say, whether for instance, it amounts to a sale or bailment or pledge or mortgage or some other transfer of property, or whether sufficient delivery has been made to pass title, or whether

recording or filing of an instrument, be required, and, if so, as to whom it will be void for lack of recording, etc., is to be determined by the state law and the bankruptcy court will take it as so determined."

In re Tansill, (District Court, So. Carolina 1922) 17 Fed. (2) 413, 415.

Accord:

Dooley vs. Pease, (1900) 180 U. S. 126, 128; 45 L. Ed. 457, 459.

Etheridge vs. Sperry, (1890) 139 U. S. 266, 274, 277; 35 L. Ed. 171, 175, 176.

Union National Bank of Chicago vs. Bank of Kansas City, (1889) 136 U. S. 223, 235; 34 L. Ed. 341, 345.

Harkness vs. Russell, (1886) 118 U. S. 663, 678; 30 L. Ed. 285, 290.

Hervey vs. Rhode Island Locomotive Works, (1876) 93 U. S. 664, 671; 23 L. Ed. 1003, 1004.

In re Floyd & Hayes Estate, (4 C. C. A. 1916) 232 Fed. 119, 122.

Liquid Carbonic vs. Quick, (3 C. C. A. 1910) 182 Fed. 603, 607.

The law in Washington is plain that no conditional sale arises unless the receiver of property is under a legally enforceable obligation to purchase it. In this state the delivery of personal property with an option to purchase does not constitute a conditional sale.

Eilers Music House vs. Fairbanks, (1914) 80 Wash. 379, 380-1; 141 Pac. 885.

Eilers Music House vs. Archer, 81 Wash. 698; 142 Pac. 453.

Inland Finance Co. vs. Inland Motor Car Co., (1923) 125 Wash. 301, 304-5, 216 Pac. 14, 15.

Bank of California vs. Clear Lake Lumber Co., (1928) 146 Wash. 543, 556-7; 264 Pac. 705, 710.

Lahn & Simmons vs. Matzen Woolen Mills, (1928) 147 Wash. 560, 565; 266 Pac. 697, 699.

In *Lahn & Simmons vs. Matzen Woolen Mills, supra,* the Supreme Court of Washington approved the language in *Eilers Music House vs. Fairbanks, supra,* as follows:

> "A contract of conditional sale contemplates the relation of vendor and vendee. In *Eilers Music House vs. Fairbanks,* 80 Wash. 379, 141 Pac. 885, it is said: 'The whole tenor of the instrument shows that the goods were to be consigned for sale upon commission, and that there was no conditional sale, because the contract does not create the relation of vendor and vendee.' "

In *Bank of California vs. Clear Lake Lumber Company, supra,* the Great Northern Railroad Company had leased personal property to a lumber company for five years, giving the lumber company a written option to purchase the property. A contest

developed between the creditors of the lumber company, which became insolvent, and the Great Northern Railroad Company, the receiver for the lumber company claiming that the transaction constituted a conditional sale contract and was void as against creditors for want of recordation. The Washington court say:

> "But this, it appears to us, is nothing but an option granted to the lessee, which he may or may not exercise as he sees fit. Certainly it cannot be claimed that, under this agreement, the lessor could have waived his right to retake the property and sue for the purchase price. A vendor in a conditional sale contract has a choice of remedies. He may disaffirm the sale by retaking the property, or he may affirm it by suing to recover the balance of the purchase price. (Citations.) We conclude, therefore, that this is but a lease with option to purchase, and that the Great Northern Railway Company is entitled to recover from the receiver all of the rails. * * *."

Even more pertinent is the language of the Supreme Court of Washington in *Inland Finance Co. vs. Inland Motor Car Co., supra.*

> "* * * To constitute a conditional sale there must be a contract between the parties by which the one party agrees to sell and the other party agrees to buy. This is not only the general understanding of such a transaction, but it is the transaction the statute regulates. The wording of the statute is (Remington's Comp. Stat. Sec. 3790):

'That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute * * * unless * * * a memorandum of such sale, stating its terms and conditions * * * shall be filed. * * *.'

These words plainly imply an agreement to sell on the one part and to buy on the other, and just as plainly imply that without such an agreement there is no conditional sale."

The same rule has been announced by this court and so far as we can find is uniformly recognized in the other Federal Courts.

In re Renfro-Wadenstein, (9 C. C. A. 1931) 53 Fed. (2) 834, 836-7.

McKey vs. Clark (*In re Tomlinson-Humes, Inc.*), (9 C. C. A. 1916) 233 Fed. 928, 933.

In re Otto-Johnson Mercantile Co., (District Court, New Mexico, 1928) 52 Fed. (2) 678, 680.

Walter A. Wood Mowing & R. Machine Co. vs. Van Story, (4 C. C. A. 1909) 171 Fed. 375, 378, 380-381.

In re Pierce, (8 C. C. A. 1907) 157 Fed. 757, 758.

Mitchell Wagon Co. vs. Poole, (6 C. C. A. 1916) 235 Fed. 817, 820.

In *McKey vs. Clark, supra,* this court say:

"What Myers did, however, was to give to Tomlinson-Humes (the bankrupt) an option

> or right to buy the pictures upon payment of certain sums of money, and he turned the possession of the pictures over to the optionee in order that it might better effect a sale. * * * It must be very generally true that the market for highly valuable paintings is very limited, and dealers in turn must be comparatively few in number; and it might well be that a dealer, not having the means to buy outright, would obtain from the owner an option, and, to help bring about sale, that the owner might intrust his pictures to the holder of the option, so that holder could exhibit them at its established place of sale and thus be in a better position to deal with purchasers and deliver readily in the event a buyer is found. But, in the case before us, until the option was determined, no title passed from Myers, the owner, to Tomlinson-Humes, and in the absence of clear evidence to the contrary, it is not to be presumed that the owner intended that title should pass until the purchase price was paid."

The court thereupon held (p. 936) that the bankrupt had "no interest in the pictures to which a judgment lien could have attached, or which passed to the creditors when bankruptcy came."

In the *Renfro-Wadenstein* case, *supra,* this court (p. 836) set out the provision of the contract which provided that

> "In case of such termination party of the first part (the consignor) shall have the right, at its option, to require party of the second part (bailee) to keep and pay for the consigned

goods then remaining on hand at the invoiced price thereof. * * *."

This court then discusses the above authorities with an extensive quotation from *In re Galt,* recites the elements of a conditional sale contract (p. 837) as outlined in the Washington decisions previously quoted and upheld the contract as a consignment agreement.

In *Otto-Johnson Mercantile Co., supra,* it is said:

> "I think the true relation between the Acceptance Corporation and the Mercantile Company was that of bailor and bailee with an option in the bailee, the Mercantile Company, to purchase the automobiles upon payment of the price fixed in the schedule, as a special method of securing the advances made by the former to the latter. (Citations.) An option to purchase in the holder of a chattel will not destroy his character as bailee. (Citation.)"

The Fourth Circuit Court of Appeals in *Walter A. Wood Mowing & R. Machine Co. vs. Van Story, supra,* say (pp. 380-381):

> "The fact that the bankrupt was given an option to purchase a portion of this property did not change the nature of the contract, by virtue of which the property was stored with the bankrupt as hereinbefore stated; it having no more right to the property by virtue of its being in its possession than it would have had,

had the property been in the hands of petitioner or some other party, inasmuch as it was clearly the intention of the parties that the petitioner was to retain title to the property. Even if the bankrupt had an option to purchase the entire lot of machinery deposited with it under the circumstances, with the conditions attached as in this instance, the granting of the option on the part of the petitioner could not have the effect of converting the bailment into a sale, nor could it vest the bankrupt with the title to the property."

And at page 378 the court used this language:

"The bankrupt had a right to sell any machines any time it saw fit to its own customer upon its own terms and use the proceeds as its own without reporting the sale or either remitting the proceeds to the petitioner. There is not evidence that it was allowed any commission upon such sale. It was not required to account for such machines so sold until the time of the annual settlement."

From *Mitchell Wagon Company vs. Poole, supra,* we quote as follows (p. 820):

"The contract here provided for the bankrupt becoming purchaser in several contingencies. One was when he sold the wagons. This follows from the fact that he had a right to sell on such terms as to price and time of payment as he liked, but was bound, if he sold, to pay appellant for them at a fixed price and a fixed time, and the proceeds of the sale were to be his. A sale by him was, in effect, a purchase and a re-sale."

The Eighth Circuit Court of Appeals in *Re Pierce, supra,* adjudicated a contest between a bailor and a trustee in bankruptcy. The bailment provided that if the bankrupt failed to sell the implements received, he should either purchase and pay for them at prices fixed or hold them subject to the order of the bailor. The court say (p. 758):

> "The contract under which the property in controversy was delivered by the Deere & Webber Co. to the bankrupt was one of bailment for sale. The title remained in the petitioner."

We have heretofore been dealing with cases like the instant case in which the bailee has an option to buy. More strongly in favor of appellant is the line of decisions in the Federal Courts that the bailor may hold as against a trustee in bankruptcy personal property which had been delivered by the bailor into the possession of the bankrupt with an option reserved in the bailor to *compel* the bailee to purchase it. To this effect are:

In Re Galt, (7 C. C. A. 1903) 120 Fed 64, 69.

In Re Harris & Bacherig (District Court, M. D. Tenn. 1913) 214 Fed. 482, 483.

McCallum vs. Bray-Robinson Clothing Co., (6 C. C. A. 1928) 24 Fed. (2) 35, 37-38.

In Re Klein, (2 C. C. A. 1924) 3 Fed. (2) 375.

We quote from *In Re Galt, supra,* as follows:

"It is claimed that the agreement is a conditional sale, within the doctrine of *Chickering vs. Bastress* (Cit.) * * *. But in each of those cases the party receiving the goods gave to the other his notes, evidencing a contract to pay absolutely; the proceeds of the sales to be applied upon the notes. The case is like to that of *Lenz vs. Harrison,* 148 Ill. 598, 36 N. E. 567, where an agreement similar to the one in hand was held to be a bailment, and not a sale. The clause in the contract giving an option to the company to require Galt to give his note, or to pay in cash, or to store, subject to the order of the company, the goods not sold within twelve months, is probably the strongest clause in the contract to indicate a sale; but, as suggested by the Supreme Court of Illinois in *Lenz vs. Harrison, supra,* while it might have such force considered alone, taking it with the whole contract, it was seemingly incorporated to compel the agent promptly to sell, and report sales within the time stated. The cases in Illinois are carefully distinguished in *Manufacturing Co. vs. Lyons, supra,* and fully sustain our holding that the contract in question constitutes a bailment, and not a sale. Such construction accords with the decisions elsewhere upon like contracts."

In *In Re Harris & Bacherig, supra,* District Judge, and later Mr. Justice, Sanford said (p. 483):

"The trustee insists that the option given the consignors, on default by the consignees, to either retake the unsold goods or to require the consignees to pay for the same, necessarily had the effect of making the transaction a sale rather than a bailment.

* * * * * * * *

In other words, as I construe the contract, it is essentially and primarily a consignment contract providing for the return of the unsold goods, with an option, however, given to the consignors to turn it into a contract of sale upon the happening of certain conditions. This option, however, was never exercised by the consignors."

The court then reviews the Federal authorities and adds (p. 485):

"In other words, these cases proceed upon the principle that where the title is vested, subject to defeasance by right of return in the purchaser, this is a conditional sale vesting title at once; but, where the property is merely delivered with a right in the bailee to subsequently purchase, the title is not vested until this option is exercised. So, * * * I am constrained to conclude, * * * that where, as in the present case, the consignment contract expressly reserves title in the consignor, with the right to demand the return of unsold goods, and merely gives him an option, upon the happening of certain conditions, to change the contract into one of sale as to the unsold goods, the contract remains until this option is exercised by the consignor one of consignment merely and not of sale."

The foregoing decision is cited in *McCallum vs. Bray-Robinson Clothing Co., supra,* as a basis for the following statement (pp. 37-38):

"But, even if the paragraph in question were construed as giving appellee an option to

> require bankrupt to purchase the goods not sold at the end of the regular selling season, such provision alone would not convert the consignment contract into one of sale."

The quotation to the same effect in *In Re Klein*, *supra,* is too long to be set out here.

In crescendo we next call attention to the holding by the Circuit Court of Appeals for both the Eighth and Sixth Circuits, that even a provision in the consignment agreement that upon the happening of a certain contingency the consignee *must* purchase the goods does not change the contract from a contract of consignment into a conditional sale.

> *Mitchell Wagon Co. vs. Poole,* (6 C. C. A. 1916) 235 Fed. 817, 820-824.
>
> *Franklin vs. Stoughton Wagon Co.,* (8 C. C. A. 1909) 168 Fed. 857, 860.

Our contract (R. 14-16) contains no obligation by the bankrupt to buy any suit pattern nor to sell one. Both parties to the agreement knew and intended that in the normal course of business the bankrupt would solicit individual customers to purchase custom made suits, the foundation of which suits would be the woolens of appellant. Both parties knew that no suit pattern would be deliberately cut until the tailor had a customer who had contracted to buy a suit made from that particular pattern.

The cutting of the cloth into 22 or 23 pieces (R. 90) was not an end in itself. The end was the sale of a suit to a particular customer whose body alone it would fit. The tailor was not making a suit for himself, nor was he making it for the use of appellant. The process of manufacture was a mere transition period. The gist of the transaction was the delivery of the garment to the purchaser, at which moment title passed to the purchaser freed from any claim of appellant as between it and the purchaser. Concerning manufacture of the garment, the language of the tenth paragraph is:

> "The party of the second part shall have the right * * * to make up * * * said merchandise into garments, but in such case the title to all such garments shall remain in the party of the first part."

In *Borman vs. U. S.* (2 C. C. A. 1919) 262 Fed. 26, *supra,* which the Learned Trial Court cites as authority for his holding that the title to the suit passed to the bankrupt, we most respectfully urge that the Second Circuit Court of Appeals in that case decided exactly to the contrary because they say (p. 29):

> "Moreover, it was provided, as we have seen, that 'all rags and clippings from the linings "shall remain" the property of the United

> States'; that is to say, the title in the rags and clippings must under this language have been all the time in the United States. If the title to the linings had passed out of the United States at the time of their delivery to the contractor, the title to so much of the linings as subsequently became rags and clippings originally passed along with the rest, and it could not properly have been said that as to them the title should continue or 'remain' in the United States. Some other language would have been necessary to indicate that the United States was to be reinvested with the title which it lost when the linings were delivered. Assuming, then, a sale, it is clear that the title could not have been intended to pass until the linings were cut out, and then only as to so much as were used in the jerkins."

In other words, in the *Borman* case, the title to the linings was to "remain" in the United States and the title to the portion of the goods which was used in making the jerkins is thereupon construed to pass to the contractor. In the instant case the tenth paragraph of the contract provided that the title to the garment was to "remain" in appellant. This record shows that as minute pieces of cloth what was left was valueless (R. 90-91). If, therefore, effect is given to the terms of the contract in the instant case as it was in the *Borman* case, the conclusion is irresistible that the title to the manufactured garment was still in appellant. When, therefore, such garment was delivered to the pur-

chaser, then as between appellant and the bankrupt the sale was a sale of the garment of appellant; the proceeds therefor as a matter of law became the property of appellant except (as provided in the tenth paragraph), that the bankrupt should "receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein."

At the risk of prolixity, we repeat: The Learned Trial Court decided as a matter of law that the method of doing business outlined by the tenth paragraph of the contract in question constituted a sale irrespective of the language therein, that the title to the manufactured garment "shall remain in the party of the first part," and irrespective of a similar provision in the preceding paragraph (R. 16) which also reserves title in the woolens in appellant. It is our contention that the question is not one of law, but one of intention of the parties as decided in *United States vs. Borman, supra.* We regard *Laflin & Rand Powder Co. vs. Burkhardt,* (1878) 7 Otto, (97 U. S.) 110, 24 L. Ed. 973, as an authority to the same effect. In that case a manufacturer of powder under his own patented process had a written contract with the plaintiff whereby the plaintiff should

furnish him materials for making powder, and money wherewith to buy other materials for the same purpose. The inventor, Dittmar, was to manufacture the powder and consign it to the plaintiff for sale, the net profits to be divided equally between the parties. One of Dittmar's creditors seized and sold on execution materials which had been furnished by plaintiff company under the contract. The question before the United States Supreme Court was whether the title to the materials which plaintiff furnished to Dittmar for the purpose of being manufactured into explosives under the terms of the contract remained in the plaintiff or passed to Dittmar and were thus liable for sale upon execution by the creditor of Dittmar. So that the question was squarely raised (but not decided in this language), whether the court should decide as a matter of law (as the Learned Trial Court did in this case), that the title to materials furnished for the purpose of manufacture passed to the one in whose possession they were found, or whether the question was one of intention of the parties to be determined from the language which they used. The United States Supreme Court did not decide the *Laflin case* as a matter of law, but did examine the language of the contract to determine what was the *intention* of the par-

ties as to the passing of title. In construing the contract the United States Supreme Court say: (7 Otto (110 U. S.) 118, 24 L. Ed. 973, 974):

> "The 'advances and the cost of the raw material are to be charged to the said party of the first part, against the manufactured goods to be consigned to the party of the second part' * * * These expressions are strongly indicative of the *intention* to make Dittmar a debtor for the moneys and materials furnished to him under the contract." (Italics ours.)

In *Hatch vs. Standard Oil Company* (1879), 10 Otto, (100 U. S.) 124, 131, 134, 25 L. Ed. 554, 556, 557, the question was whether title had passed to the property. The court say (p. 131):

> "* * * It is ordinarily correct to say, that, whenever a controversy arises in such a case as to the true character of the agreement, the question is rather one of intention than of strict law; the general rule being that the agreement is just what the parties intended to make it, if the intent can be collected from the language employed, the subject matter, and the attendant circumstances. ....
>
> * * * * * * *
>
> (P. 134):
>
> " 'There is no rule of law,' says Blackburn, J., in the case last cited, 'to prevent the parties in such cases from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply the same,

> on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual.' "

We do not understand why the parties to a consignment may not use apt language to accomplish the same purpose and we most respectfully contend that *United States vs. Borman, supra,* and *Laflin & Rand Powder Co. vs. Burkhardt, supra,* are authority that they can.

Here are two business concerns conducting a legitimate business. They deem it to the interests of both of them that goods of one shall be committed to another; that the title to those goods shall remain in the one; that the other shall have the right to combine such goods with goods of his own; that the title to the manufactured article shall remain in the one and that the other shall be empowered to transfer the title of the one to a third party. The Learned Trial Court does not find that the tendency of such an arrangement is fraudulent. There is therefore no rule of morals why the contract should not be enforced as it reads and we most respectfully urge upon this court that where parties engage in a legitimate business undertaking and by a contract which is not susceptible of construction fix their legal rela-

tions, the highest rule of public policy requires that such contract be enforced. For the foregoing reasons we respectfully urge that the contract in question is not a contract of conditional sale, but is a legitimate consignment agreement.

If Your Honors shall sustain our position in the foregoing discussion, then the decree of the Learned Trial Court should be reversed in so far as it requires us to pay for the suitings which we took back just prior to bankruptcy and in so far as it requires us to pay the $227.23 which we collected from the assigned accounts and which latter sum is the value of appellant's consigned merchandise in the accounts which the bankrupt assigned to appellant just prior to bankruptcy, and in so far as it requires us to reassign to the trustee the three uncollected accounts which we still have.

If Your Honors shall hold that the tenth paragraph of the contract (p. 16) constituted an option by the bankrupt to purchase our merchandise, we still contend that the Learned Trial Court should be reversed as to the merchandise which we re-took, but in that event we would not be entitled to hold said $227.23, nor the three accounts. Of course, if Your Honors hold with the Learned Trial Court that the transaction was a sale and not a bailment the

decree should be affirmed.

It now remains only to discuss the criticisms by appellee of the terms of the contract (R. 14-16) and of the conduct of appellant which appellee contends are fatal to the defense of appellant in this case.

One contention of appellee is that subsequent creditors of the bankrupt existed who were ignorant of the assignment. The Learned Trial Court properly so found. (R. 33, 34). Appellant contends that its exception to this finding (R. 34) must be sustained because:

(a) The court did not find that appellant had actively participated in any fraud upon subsequent creditors;

(b) The court did not find that either appellant or the bankrupt had attempted to conceal the existence of the consignment contract;

(c) The court did not find that any creditor had been misled by the consignment contract.

We will consider first the rule in the state of Washington and then that adopted by the Federal courts.

WASHINGTON RULE

Eilers Music House vs. Fairbanks, (1914) 80

Wash. 379, 383; 141 Pac. 885, 886.

Lloyd vs. McCallum Donohoe Co., (1923) 127 Wash. 180, 185-186; 219 Pac. 849, 851.

Bauer vs. Commercial Credit Co., (1931) 163 Wash. 210, 216; 300 Pac. 1049, 1051.

In *Eilers Music House vs. Fairbanks, supra,* a creditor of a factor had received from the factor consigned goods in satisfaction of a debt—which is what the trustee in bankruptcy is seeking to do in the instant case. The Washington court quoted with approval from two other authorities from which the following are excerpts (p. 382):

> "Whenever the factor has bartered or disposed of goods in a manner not within the ordinary and accustomed modes of transacting the like business, the principal may follow and reclaim the property, and in such case *it is wholly immaterial whether the person dealing with the factor knew him to be such or not.*" (Italics ours.)
>
> "* * * But if the principal has by any act of his own induced a third person to believe he has given the factor authority to dispose of the goods the principal cannot reclaim them. The principal may recover goods or the proceeds of a consignment of a person to whom they were turned over in the payment of an antecedent debt due from the factor. If goods are wrongfully taken from the possession of a factor by an officer the owner may recover them back."

In *Bauer vs. Commercial Credit Co., supra,* the Washington Supreme Court say:

"* * * We are also mindful of, and still adhere to, the rule stated as follows in *Lloyd vs. McCallum Donohoe Co.,* 127 Wash. 180, 219 Pac. 849. * * *: 'It is a common thing for an owner of property to place it in the hands of a broker or factor for sale, and, in so far as we are advised, no court has yet held that he thereby subjects his property to the debts of the broker or factor. On the contrary, we have held that he does not.' *Eilers Music House vs. Fairbanks,* 80 Wash. 379, 141 Pac. 885."

Rule in the Federal Courts

Taylor vs. Fram, (2 C. C. A. 1918) 252 Fed. 465, 469.

McCallum vs. Bray-Robinson Clothing Co., (6 C. C. A. 1928) 24 Fed. (2) 35, 37.

In Re Klein, (2 C. C. A. 1924) 3 Fed. (2) 375, 379.

We quote from *Taylor vs. Fram, supra:*

"The District Judge in his opinion attached importance to the fact that the bankrupt did not advertise himself as an agent, nor have any sign to show that he was selling goods on consignment. We know of no rule of law which makes it incumbent upon one who receives goods upon consignment to sell that he should advertise the fact of his agency to his customers; and we do not attach any importance to the nondisclosure by the bankrupt that he received the goods in his capacity as an agent."

From *McCallum vs. Bray-Robinson Clothing Co., supra,* we quote as follows:

> "The fact that the consigned goods were kept in the store not separate and apart from other goods, and that the public could not distinguish the one from the other, is not important, in the absence of fraud or of proof that any creditor extended credit to bankrupt upon reliance of title to those goods in the bankrupt."

The Second Circuit Court of Appeals *In Re Klein, supra,* say:

> "The petitioners owed no duty to other creditors to give notice that the consigned goods were not the bankrupt's own property."

The United States Supreme Court and this court in line with many others raise an estoppel against a consignor only by his active participation in a fraud committed by the consignee upon creditors.

Greey vs. Dockendorff, (1913) 231 U. S. 513, 516; 58 L. Ed. 339, 343.

Ludvigh vs. American Woolen Co., (1913) 231 U. S. 522, 529; 58 L. Ed. 345, 350.

In Re King, (9 C. C. A. 1920) 262 Fed. 318, 321.

In Re Taylor, (District Court, E. D. Mich. 1931) 46 Fed. (2) 326, 328, 329.

In Re Weisl, (District Court, S. D. New York 1924) 300 Fed. 635, 639, 640, 642.

In *Greey vs. Dockendorff, supra,* Mr. Justice

Holmes, speaking for the United States Supreme Court, said:

> "It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors, (Citation) and merely keeping silence to the latter, whether known or unknown, created no estoppel. (Citations.) There was no active concealment and no attempt to mislead anyone interested to know the truth."

In *Ludvigh vs. American Woolen Co., supra,* in the course of its opinion the court say:

> "It is urged that the goods were not kept separately, but it appears that the tags of the Woolen Company were left upon the goods, and it is not shown that any creditor relied upon mis-marking or misbranding."

The validity of two consignments was upheld by this court in the case of *In Re King, supra.* In sustaining one of the two consignments as against a charge of fraud, this court so sustained the consignment upon the ground that the transaction was

> "* * * unattended * * * by any positive act of the consignor that can be properly held to have enabled the consignee to commit any fraud upon the public."

The following quotations from *In Re Weisl, supra,* are apt:

(p. 639) "The law might, of course, make goods liable to the debts of any bailee to whom the owner entrusted them. The possibility of raising a fictitious credit by such means undoubtedly exists, and with it of harm to creditors. Yet this has never been so, and it would obviously destroy the basis upon which enormous transactions take place daily. In a sense there seems little difference between selling goods with a purchase-money mortgage, and leaving them in a factor's possession to sell. But, wisely or not, an owner may safely do as much if he do not aid the factor in falsely representing the goods as his. The line is drawn at the passage of title, and the owner does not begin to lose any of his rights until he becomes privy to some deceit by the factor. *Miller Rubber Co. vs. Citizens Co.* (C. C. A. 9) 233 Fed. 488, 147 C. C. A. 374, was a case where the contract was held to be a fraudulent cover for a sale, because the factor was allowed to mix the goods with his own, and because the principal gave him stationery by which he might represent them as his own. These circumstances were thought enough in the case of automobile tires to make the contract fraudulent."

* * * * *

(p.640) "Further, it is urged that Dudley sold the goods in his own name. So they did, and so Seacoast doubtless knew that they did. If a question had arisen as to Dudley's power to sell, no doubt these circumstances might have been relevant in favor of the buyer; but it is impossible to see how they can be relevant as respects creditors. If a factor sells his principal's goods, in his own name, with his principal's knowledge it is no fraud upon his cred-

itors for the principal to re-claim such of the goods as the factor has not sold.

"The representation cannot go further than the goods in respect of which it is made, which by hypothesis are sold at the time of the representation. The principal's implied consent involves no representations to creditors of the character of the factor's interest in other goods."

* * * * *

(p. 642) "I know of no rule by which, on pain of sharing in his guilt, one must uncloak a wrongdoer merely because he is one's debtor, even one's insolvent debtor. To establish such a relation, the accomplice must either take an active part by advice or persuasion, or he must be under a positive duty to act, or it must be shown that the wrong was done on his behalf, and that he later accepted some share of the proceeds."

A consignment contract was upheld in *In Re Taylor, supra,* where, (p. 328) "This merchandise was added to other stock in the retail store of the bankrupt and there displayed and sold by him to his customers in the regular course of trade and without any identification or representation relative to the ownership thereof." The District Court said (p. 329):

"In the absence, as here, of any indication of actual fraud or bad faith of either of the parties towards creditors, or of the reliance by any such creditors upon the apparent ownership by the bankrupt permitted by the

petitioner, there is no basis for the claim of estoppel urged by the trustee. *In Re Klein,* 3 Fed. (2) 375, (C. C. A. 2nd); *McCallum vs. Bray-Robinson Clothing Co.,* 24 Fed. (2) 35, 37. (C. C. A. 6th). As was said by the Circuit Court of Appeals in the Sixth Circuit in the case last cited: 'The fact that the consigned goods were kept in the store not separate and apart from other goods and that the public could not distinguish the one from the other, is not important, in the absence of fraud or of proof that any creditor extended credit to bankrupt upon reliance of title to those goods in the bankrupt."

ALLEGED FAILURE TO CARRY OUT THE TERMS OF THE CONSIGNMENT.

No estoppel against the consignor arises on account of the failure to carry out the exact terms of the consignment unless creditors were misled.

Ludvigh vs. American Woolen Co., (1913) 231 U. S. 522, 529; 58 L. Ed. 345, 350.

McElwain-Barton Shoe Co. vs. Bassett, (8 C. C. A. 1916) 231 Fed. 889, 893.

We have already quoted from the *Ludvigh* case, *supra,* (ante p. 55) where the woolens merely had tags of the Woolen Company upon them and were not kept separate from the other goods of the bankrupt. The United States Supreme Court upheld the consignment contract upon the ground that

"It is not shown that any creditor relied upon mis-marking or mis-branding."

To the same effect:

McElwain-Barton Shoe Co. vs. Bassett, supra, where the course of dealing between the parties on a consignment agreement (which the court held valid) varied from that set out in the contract. The Eighth Circuit Court of Appeals say (p. 892):

> "There is no evidence in the record that any creditor of Adkins was misled in any way by the course of dealings between appellant and Adkins."

Variations from the consignment agreement have been held not to invalidate it in the following cases:

General Electric Co. vs. Brower, (9 C. C. A. 1915) 221 Fed. 597, 601.

McCallum vs. Bray-Robinson Clothing Co., (6 C. C. A. 1928) 24 Fed. (2) 35, 37.

McElwain Barton Shoe Co. vs. Bassett, (8 C. C. A. 1916) 231 Fed. 889, 891, 892.

Bransford vs. Regal Shoe Co., (5 C. C. A. 1916) 237 Fed. 67, 68, 69.

In Re King (9 C. C. A. 1920) 262 Fed. 318, 321.

In *General Electric Co. vs. Brower, supra,* it was stipulated that a consignee of lamps for sale did not keep them separate and apart from other stock of the bankrupt except that they were kept

together on shelves in one place and in boxes marked, "Banner Electric Co." (p. 600.) The District Court held that that consignment contract was void. This court in reversing him said (p. 600):

"Gilbert, Circuit Judge:

'It is the contention of appellee that where goods are delivered by a manufacturer to a seller, and the latter is allowed to place them with his stock of goods, and sell and dispose of them in the ordinary course of business, to manage and control them as other goods, and where he pays all the taxes, cartage, storehouse charges, and all other expenses in connection therewith, and agrees to pay for such goods so disposed of, and there is neither an agreement to return the goods nor an agreement to account for the proceeds of the sale of goods as such, there is no bailment. To sustain that contention, the case particularly relied upon is *In Re Penny & Anderson,* (D. C.) 176 Fed. 141. That was a case in which the claimants had delivered to the bankrupts, who were conducting a restaurant, a stock of wines and liquors under an agreement called a "memorandum of consignment," which contained an invoice of the liquors and prices thereof, and provided that they should be considered as delivered on consignment, and should remain the property of the claimants until the full indebtedness of the bankrupt should be paid. There was no restriction in the sale of the liquors by the bankrupts, as to price or otherwise, and no provision respecting the disposition of the proceeds. It was held that the transaction was not a consignment but a sale; the court ruling that the

transaction did not create the relation of principal and factor. That conclusion was based upon the fact that the invoice accompanying the goods contained the words, "sold to Messrs. Penny & Anderson, terms on consignment," and gave the price of each article of consignment, and the fact that the debtors were permitted to sell and dispose of the goods as they saw fit, and at any price and terms, for consumption on the premises as required in their business, and that the agreement was silent as to the disposition of the proceeds, and recognized only an indebtedness to be paid before the title vested in the consignees.

Substantially different is the contract in the case at bar. (The court then discusses the elements of a consignment contract in the agreement.) These provisions, so far as they go, all clearly and unequivocally mark the contract as a contract strictly of agency.

We will briefly consider the provisions therein that are said to indicate a contrary intention. Those provisions are the agent's assumption of liability for loss, and for the payment of certain expenses, and for insurance. Such provisions do not change a contract of agency into a contract of sale. Nor was the contract rendered a contract of sale by reason of the fact that it contained no provision that the agent should keep the money separate and apart from its other moneys, or that it should turn over the money received from the sale to the manufacturer, but instead was to pay for the lamps sold each month, less 29%, for making the sales. *Eilers Music House vs. Fairbanks,* (Wash.) 141 Pac. 885. In *Sturm vs. Boker,* 150 U. S. 312, 14 S. Crt. 99, 37 L. Ed. 1093,

the court said: "A bailee may, however, enlarge his legal liabilities by contract, express or fairly implied, and render himself liable for the loss or destruction of goods committed to his care; the bailment or compensation to be received therefor being a sufficient consideration for such undertaking."

In Re Flanders, 134 Fed. 560, 67 C. C. A. 484, the court said:

"The objections that ordinary invoices accompanied the shipments, that such shipments were made direct to Flanders, that the latter was sold by him in his own name, that he allowed credit upon sales, that he guaranteed sales, and that he insured in his own name, do not change the nature of the transaction."

In Re Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611, it was held that a contract between a furnisher of goods and the receiver, that the latter may sell, and at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will pay the expense of insurance, freight, storage and handling, and that he will hold the merchandise unsold subject to the order of the furnisher, discloses only an agreement of bailment for sale, and does not evidence a conditional sale.

In *John Deere Plow Co. vs. McDavid,* 137 Fed. 802, 70 C. C. A. 422, the court gave similar construction to a contract containing like provisions.

Of similar import are *In Re Pierce,* 157 Fed. 757, 85 C. C. A. 14, and *Franklin vs.*

Stoughton Wagon Co., 168 Fed. 857, 94 C. C. A. 269.' "

In *McCallum vs. Bray-Robinson Clothing Co., supra,* the consignor sent goods to the bankrupt, together with a consignment contract about February 1, 1925. The contract was not signed until August 20, 1925.

> "The bankrupt made settlements for the goods shipped on consignment at somewhat irregular intervals, generally at the end of each week. * * * Fire insurance policies on the consigned goods were issued in the name of the bankrupt, which action was acquiesced in by the claimant."

In a note on page 37 it is stated that the bankrupt also made some remittances at an "average" price, but consignor insisted upon remittances according to the contract and that:

> "These two instances do not affect the nature of the contract relation as one of consignment, nor its good faith. *McElwain Barton vs. Bassett, supra,* at page 893; *General Electric Co. vs. Brower,* (C. C. A. 9) 221 Fed. 597, 601, 602."

In *Bransford vs. Regal Shoe Company, supra,* the Fifth Circuit Court of Appeals affirmed the decision of the District Court which established the validity of a consignment with the terms of which

the parties had observed and complied "in so far as the exigencies of trade permitted." (p. 69.)

In *In Re King, supra,* this court held valid a consignment under the following circumstances: (p. 321.)

> "No account of sales was made by King, nor sent to the Empire Company. Shortages in the stock of tires on hand at his shop were filled regularly by the Empire Company after the monthly inventory of stock; such replenishments being made without any order from King."

The report of the case does not disclose whether the tires were or were not kept separate in his place of business, but the case does disclose that the stock of tires delivered under the other consignment which was held valid in the same case were kept separate and apart from other tires. (p. 321.) We assume therefore that the Empire tires were not, but that such failure was not regarded by this court as fatal to the consignment contract.

The contention of the trustee that where the alleged consignee may sell at any price he likes, being bound to pay for the goods at a fixed price, the transaction is a sale and not a bailment, is refuted in the following imposing array of cases:

Sturm vs. Boker, (1893) 150 U. S. 312, 315, 317, 330; 37 L. Ed. 1093, 1096, 1097, 1100.

Ludvigh vs. American Woolen Co., (1913) 231 U. S. 522, 524; 58 L. Ed. 345, 348.

In Re Renfro-Wadenstein, (9 C. C. A. 1931) 53 Fed. (2) 834, 835, 836; affirming 47 Fed. (2) 238, 244.

Walter A. Wood Mowing & R. Machine Co. vs. Van Story, (4 C. C. A. 1909) 171 Fed. 375, 378, 379.

McCallum vs. Bray-Robinson Clothing Co., (6 C. C. A. 1928) 24 Fed. (2) 35, 37.

In Re Galt, (7 C. C. A. 1903) 120 Fed. 64, 66.

In Re Sachs, (District Court, Md. 1929) 31 Fed. (2) 799-800.

Bartling Tire Co. vs. Coxe, (5 C. C. A. 1923) 288 Fed. 314, 315, 316.

In Re National Home & Hotel Supply Co., (District Court, E. D. Mich., 1915) 226 Fed. 840, 842, 843, 846-847.

McElwain-Barton Shoe Co. vs. Bassett, (8 C. C. A. 1916) 231 Fed. 889, 891.

Mitchell Wagon Co. vs. Poole, (6 C. C. A. 1916) 235 Fed. 817, 820.

Franklin vs. Stoughton Wagon Co., (8 C. C. A. 1909) 168 Fed. 857, 859, 860.

John Deere Plow Company vs. McDavid, (8 C. C. A. 1905) 137 Fed. 802, 808-809.

Century Throwing Co. vs. Muller, (3 C. C. A. 1912) 197 Fed. 252, 263.

In Re Pierce, (8 C. C. A. 1907) 157 Fed. 757.

Rockmore vs. American Hatters & Furriers, Inc., (2 C. C. A. 1926) 15 Fed. (2) 272.

In Re Klein & Caplin vs. Clark, (2 C. C. A. 1924) 3 Fed. (2) 375.

Brown Bros. & Co. vs. Billington, (Pa. 1894) 163 Pa. St. 76; 43 Am. St. Rep. 780, 783.

To establish our contention that the permission of the bankrupt to sell at his own price and retain the proceeds above the consignment price does not destroy the bailment it should be sufficient to discuss merely the authorities from the United States Supreme Court and from this court.

In *Sturm vs. Boker, supra,* the agreement was held to be a consignment where the consignor wrote the consignee that the latter was to ship the goods to Mexico "to be sold there by you to the best advantage." The court (150 U. S. at 330-331; 37 L. Ed. at 1100) construed the contract as follows:

> "He (consignee) assumed the expenses of transporting the goods to Mexico, the duty of selling them to the best advantage after they reached there, the obligation to account to the defendants for the price at which they might be sold, less one-half of the profits in excess of the invoice price, and if not sold, he was to return the specific articles to the defendants free of expense."

On the loss of the goods the court held that title was in the consignor and that the loss was his loss.

In *Ludvigh vs. American Woolen Co., supra,* the fourth paragraph of a contract, which the United States Supreme Court held to be one of consignment, provided (231 U. S. 524; 58 L. Ed. 348):

> "Said party of the second part (consignee) agrees to sell such merchandise to such persons as they shall judge to be of good credit * * * and to collect for and on behalf of party of the first part all bills and accounts for the merchandise so sold, and to immediately pay over to the said party of the first part any amount collected as aforesaid, * * * minus, however, the difference between the price at which said merchandise so collected for has been invoiced to the party of the second part, and the price at which said merchandise has been sold as aforesaid by the party of the second part."

In *In Re Renfro-Wadenstein, supra,* the District Court held: (47 Fed. (2) 244.)

> "The mere fact that the contract provides that the bankrupt may fix the selling price at not less than invoice and to keep commissions, covering insurance, storage, and expense of keeping, does not constitute a sale if there is no obligation of the bankrupt to buy. (Citations.)"

In the affirmance of the *Renfro-Wadenstein* case, *supra,* by this court, 53 Fed. (2) 834, that question is not raised.

Another contention of the appellee is that the failure to require the proceeds of sales to be held or the failure to hold the same as trust funds destroys the agency relationship between the owner and the possessor of chattels. The existence of any such principle of law is denied in the following cases:

Eilers Music House vs. Fairbanks, (1914) 80 Wash. 379, 380; 141 Pac. 885.

General Electric Co. vs. Brower, (9 C. C. A. 1915) 221 Fed. 597, 601.

In Re King, (9 C. C. A. 1920) 262 Fed. 318, 321.

In Re Renfro-Wadenstein, (9 C. C. A. 1931) 53 Fed. (2) 834, 838.

Franklin vs. Stoughton Wagon Co., (8 C. C. A. 1909) 168 Fed. 857, 859, 860.

In Re National Home & Hotel Supply Co., (District Court, E. D., Mich. 1915) 226 Fed. 840, 842.

Ellet-Kendall Shoe Co. vs. Martin, (8 C. C. A. 1915), 222 Fed. 851, 854.

In Re Pierce, (8 C. C. A. 1907) 157 Fed. 757.

McCallum vs. Bray-Robinson Clothing Co., (6 C. C. A. 1928) 24 Fed. (2) 35, 37.

Bransford vs. Regal Shoe Co., (5 C. C. A. 1916) 237 Fed. 67, 68.

Walter A. Wood Mowing & R. Machine Co. vs. Van Story, (4 C. C. A. 1909) 171 Fed. 375, 380.

John Deere Plow Co. vs. McDavid, (8 C. C. A. 1905) 137 Fed. 802, 808-809.

In *Eilers Music House vs. Fairbanks, supra,* the Washington Supreme Court construed a contract as one of consignment and approved a holding by the Nebraska Supreme Court that (p. 381):

> "A consignment of goods under a contract providing that the consignee shall receive them and return periodically to the consignor the proceeds of the sales at prices agreed upon or charged by the latter, is not a conditional sale, but a transaction of principal and factor."

In *General Electric Co. vs. Brower, supra,* Circuit Judge Gilbert speaking for this court said (p 601):

> "Nor was the contract rendered a contract of sale by reason of the fact that it contained no provision that the agent should keep the money separate and apart from its other moneys, or that it should turn over the money received from the sale to the manufacturer, but instead was to pay for the lamps sold each month, less 29%, for making the sales. *Eilers Music House vs. Fairbanks,* (Wash.) 141 Pac. 885."

Circuit Judge Ross speaking for this court in *In Re King, supra,* upheld as valid a consignment contract which provided, (p. 321) that the consignee would make a settlement each month by payment of an amount 20% less than the list price of

the tires sold, with a further 5% off of said list price for a settlement of accounts within thirty days as his commission. A monthly account was had between the consignor and consignee, at which time the consignee was billed as for a debt with the amount due for goods sold during the month.

In *In Re Renfro-Wadenstein, supra,* this court reversed a holding by Judge Neterer in which the Learned Trial Court had denied a consignor recovery of the proceeds of sales of its merchandise which the bankrupt had mixed with its own funds. Circuit Judge Wilbur speaking for the court says (p. 838):

> "It appears that after the execution of the consignment agreements the bankrupt continued to sell furniture in its possession without any attempt to keep separate the money or evidence of indebtedness received on account of goods so consigned, where written evidence of indebtedness was received from the purchaser. Instead of transferring these evidences of indebtedness to the appellants or holding them for their account, the bankrupt hypothecated such paper as had previously been its custom for the purpose of raising money for the conduct of the business and for making payments to his creditors, including appellants."

This court affirmed the Learned Trial Court in awarding the consignor a recovery of its merchandise and reversed the court in failing to award to the

claimant certain proceeds upon the sale of its merchandise.

In *Franklin vs. Stoughton Wagon Co., supra,* and *John Deere Plow Co. vs. McDavid, supra,* the Eighth Circuit Court of Appeals had before it similar consignment agreements which required monthly accountings of goods sold during the previous month and payment for such sales by the consignee. The contracts were held to be contracts of consignment.

In *In Re National Home & Hotel Supply Co., supra,* a consignment agreement was upheld which was silent as to the disposition of the proceeds of sales, bankrupt being merely required (p. 842) to render a monthly accounting and remit according to list prices for merchandise sold.

The consignment agreement which was held valid in *Ellet-Kendall Shoe Co. vs. Martin, supra,* contained no provision for keeping the proceeds of sale separate and merely required periodical payments for goods sold.

The Eighth Circuit Court of Appeals in *Re Pierce, supra,* upheld a consignment agreement which provided for the delivery of goods to a retailer for re-sale; the bankrupt was to pay all charges thereon; if the goods were unsold the bank-

rupt had the option to buy them or to hold the same for the wholesaler or to pay all charges thereon and to re-deliver them to the wholesaler; the bankrupt was to remit all cash received, less commissions, and to make settlement at the close of the selling season or whenever requested by the wholesaler; the bankrupt was to guarantee the notes of the purchasers and to have as his commission all amounts which he received for the goods above the consigned price.

In *McCallum vs. Bray-Robinson Clothing Co., supra,* the bankrupt fixed his own price, made some remittance at an "average" price and merely kept a separate account in his own ledger of the sales of consigned merchandise, (p. 37) and evidently therefore mixed the receipts from sales with his own funds. The contract was held to be a consignment.

The consignment agreement which was upheld in *Bransford vs. Regal Shoe Company, supra,* merely contained the provision that the consignee would on the first of each month render the consignor a complete, accurate and detailed statement of the sales of the consigned goods during the preceding month, and would at that time turn over in cash to the consignor the purchase price and one-half the

selling allowance of all consigned goods so sold by it. (p. 68.)

The Fourth Circuit Court of Appeals upheld the consignment contract in *Walter A. Wood Mowing & R. Machine Co. vs. Van Story, supra,* where (p. 380) the bankrupt was required to render the consignor at stated intervals reports of the amount of machinery on hand and that at the end of the year the consignor's agent took an inventory of the machinery. The bankrupt occasionally disposed of these machines which were then charged to the bankrupt. In some cases appropriations of this kind were not shown until the yearly inventory was taken, at which time the bankrupt was required to make settlement for the same. The bankrupt was authorized to purchase from the consignor such machines as the bankrupt might be able to dispose of to its regular customers. From the foregoing statement it is manifest that the proceeds of sales of consigned merchandise were mingled with the general funds of the bankrupt.

The only other serious contention which appellee made in the trial court was that where, as in this case, the bankrupt is to pay insurance, that that agreement is a badge of a sale and not of a bailment. The authorities are uniform that pay-

ment of taxes, insurance, cartage, freight and all other expenses, leaving the invoice price net to the consignor, does not disturb the agency relationship.

In the citations next following Your Honors will find underneath them a description of the insurance and other expenses which the consignees paid or agreed to pay on account of the consignor. In each case the relationship was held to be that of principal and agent and not of vendor and vendee:

Ludvigh vs. American Woolen Co., (1913) 231 U. S. 522, 524; 58 L. Ed. 345, 348.

"The property was to be insured for the benefit and in the name of the Woolen Co."

General Electric Co. vs. Brower, (9 C. C. A. 1915) 221 Fed. 597, 599.

Contract obligated consignee to pay all expenses in the storage, cartage, transportation, handling and sale of lamps, and all expense incident thereto and to the accounting and collection of accounts thus created.

In Re Renfro-Wadenstein, (9 C. C. A. 1931) 53 Fed. (2) 834, 835.

Contract required consignee to pay freight and carriage charges for delivery of goods to it, insure

same in name of consignor against damage by fire or water, care for the goods pending sale, and pay the expenses of the sale.

In Re Galt, (7 C. C. A. 1903) 120 Fed. 64, 66.

Consignee agreed to receive, store, pay freight, and keep under cover, in good condition and fully insured, at his own expense, all wagons; to pay all taxes on same.

In Re Pierce, (8 C. C. A. 1907) 157 Fed. 757.

Bankrupt was to pay all charges on the consigned goods.

Franklin vs. Stoughton Wagon Co., (8 C. C. A. 1909) 168 Fed. 857, 859.

Contract required consignee to pay all transportation charges, taxes, license, rents, and all other expenses incidental to the safekeeping and sale of the goods; to keep them insured for full value at expense of consignee in name and for benefit of consignor.

Ellet-Kendall Shoe Co. vs. Martin, (8 C. C. A. 1915) 222 Fed. 851, 854.

Consignee wrote "We carry insurance on our general stock and we will see that our insurance policy reads to cover consigned goods."

In Re National Home & Hotel Supply Co., (D. Ct. E. D. Mich. 1915) 226 Fed. 840, 846.

"I do not think the fact that the bankrupt paid the freight prevents petitioner from recovering."

McElwain-Barton Shoe Co. vs. Bassett, (8 C. C. A. 1916) 231 Fed. 889, 890-891.

Bankrupt agreed to pay all transportation charges, taxes, license, rent, and all other expenses incidental to the safe-keeping and sale of the shoes, to waive all claim against consignor for such expenses, to keep same insured at full value in name of consignor and for its benefit in companies satisfactory to it, to deliver policies to it and to become personally responsible for any loss caused by failure to insure; to sell for enough above invoiced prices to make its profit plus all expenses.

Mitchell Wagon Co. vs. Poole, (6 C. C. A. 1916) 235 Fed. 817, 819.

Consignee agreed to pay freight, storage, keep under cover in good condition, insure at his own expense, pay all taxes on wagons.

Bransford vs. Regal Shoe Co., (5 C. C. A. 1916) 237 Fed. 67, 68.

Consignee was to indemnify and save harmless the consignor from all loss, cost or expense arising

from loss or damage to the goods, caused by fire, accident or otherwise; and at its own expense to keep goods fully insured in name of consignor to an amount and in a company satisfactory to it.

McCallum vs. Bray-Robinson Clothing Co.,
(6 C. C. A. 1928) 24 Fed. (2) 35, 36.

Consignee made responsible for loss of goods whether by theft or otherwise, whether or not covered by insurance. Consignee to pay freight and express charges on all returned goods. Bankrupt required to insure stock for benefit of consignor.

For the foregoing reasons we respectfully submit that the decree of the Learned Trial Court should be reversed with instructions to dismiss that portion of the cause of action which seeks the recovery of the consigned merchandise, a recovery of the $227.23 which arose from the collection of accounts, which accounts resulted from the sale of garments made from consigned merchandise and that the decree should also be reversed in so far as it requires appellant to assign to the trustee the three accounts which arose in a similar manner and upon which nothing has been collected.

Respectfully submitted,

RIDDELL & BRACKETT,

Attorneys for Appellant.

No. 7768

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEMP-BOOTH COMPANY, LIMITED, a corporation,
Appellant,

—VS.—

J. M. GALVIN, as Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

MR. EARL G. RICE,
1012 Lowman Bldg., Seattle, Wash.,
Solicitor for Appellee.

MESSRS. MCCLURE & MCCLURE,
WALTER A. MCCLURE,
WM. E. MCCLURE,
905 Lowman Bldg., Seattle, Wash.,
Solicitors for Appellee.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEMP-BOOTH COMPANY, LIMITED, a corporation, *Appellant*, —vs.— J. M. GALVIN, as Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt, *Appellee.*	No. 7768

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

ADDITIONAL FACTS

We add to appellant's statement certain facts, omitted therefrom, which we deem material.

Insolvency of Bankrupt

Mr. Irving testified without reservation that at the time the bankrupt and appellant entered into the contract, the bankrupt was, and had long been, insolvent and remained insolvent until adjudicated a bankrupt (R. 80-81). The financial condition of the bankrupt was fully stated to Mr. Booth, president of appellant, before the contract was executed (R. 80). In November preceding the bankruptcy, appellant loaned to the bankrupt $100.00 to enable bankrupt to take up a

trade acceptance (R. 83). In July, 1930, the bankrupt was not able to pay bills promptly in course of business and Mr. Booth knew that fact when the agreement was made; "he understood the situation" (R. 86).

Mr. Galvin, the trustee, was formerly manager of Arnstein-Simon Co., a wholesale woolen house dealing with the bankrupt. In July, 1930, the bankrupt owed that company approximately $3,900.00 and at no time thereafter did the bankrupt pay its debts as they fell due. In October, 1930, Mr. Irving gave Mr. Galvin a statement showing liabilities of $18,229.00 and said that practically all of his accounts payable were past due. The excerpts from letters written by Mr. Irving to a creditor month by month during the year 1931 shows beyond any doubt the insolvency of the bankrupt for more than a year prior to adjudication (R. 98, 99).

The Open Account

The open account of $485.59 owing by bankrupt to defendant on July 26, 1930, the date of the consignment contract, soon increased to $1,500.00 (R. 82). During the year 1931 it averaged $1,500.00 (R. 69). This arose from goods sold outright on 30, 60 or 90 days credit (R. 71) and represented all but 25 out of the 122 charges found in Ex. 1 (R. 60-64). The first of these items is June 31, 1930, November 1, 7%, $229.60.

Insurance

The insurance policy insured House of Irving as the owner of the goods showing that title to the goods

was treated as having then passed from defendant to bankrupt; loss was payable to Kemp-Booth as its interest might appear as though defendant's interest was that of mortgagee or debtor for a balance of purchase price (R. 97-98).

Fraudulent Concealment

Bankrupt did not have exhibited on the premises anything to indicate that they were agents of Kemp-Booth (R. 79, 89). Neither letterheads nor bill heads stated that bankrupt was an agent of Kemp-Booth. Bankrupt did business exclusively in the name of House of Irving. Bankrupt never called the attention of a customer to the fact that Kemp-Booth claimed a lien upon the goods until they were paid for (R. 89). Bankrupt told no customers or creditors that they held goods on consignment. Mr. Irving testified that he considered all business transactions confidential, and that he did not consider it necessary to give the public or his creditors any information regarding his business (R. 89, 90).

Mr. Garrett testified that the bankrupt's alleged agency for defendant was not disclosed by anything on the premises. He said:

> "That is a thing ordinarily kept covered up by the tailors. We considered it confidential to the two parties to the contract. If another woolen house dealing with the bankrupt had made inquiry from us whether we had goods on consignment in the hands of the bankrupt it would have depended entirely upon circumstances whether the information would have been given. No

woolen house gives out that kind of information though it sometimes leaks out." (R. 79)

J. M. Galvin testified that during the life of this contract he asked and received from bankrupt a statement of its assets and liabilities at the instance of Arnstein-Simon & Co., a creditor to which the bankrupt owed $3,900.00. In October, 1930, Mr. Irving gave him a statement of his woolen stock as $16,234, but he did not mention that he held goods on consignment (R. 104). This was a fraudulent concealment.

James O'Connor, bankrupt's landlord, was frequently at bankrupt's store, and did not know that bankrupt held any goods on consignment, and never saw or heard of anything suggesting such a consignment. When the goods were removed from the store, there was $2,331.89 due on account of rent and services. Three other creditors testified that they had claims against bankrupt for services rendered after the date of the agreement and it was conceded by defendant that there were subsequent creditors (R. 45, 103, 104).

ARGUMENT

Appellant seeks reversal of the decree of the trial court in three particulars:

First: That part of the decree directing the defendant to reassign the remaining three accounts receivable.

Second: To the extent of $227.23 of that portion of the judgment, amounting to $905.50, collected by defendant on assigned accounts receivable.

Third: That portion which awarded recovery of the agreed value of the alleged consigned merchandise returned, $1,652.23.

Regarding the Three Accounts Receivable

About January 29, 1932, after receipt of the $600.00 which appellant concedes was preferentially paid, bankrupt was still indebted to defendant in the further sum of about $2,700.00, partly open account items dating back to May 11, 1931, and partly for merchandise used from alleged consigned goods. Bankrupt, not having the money to pay, but wishing, somehow, to pay defendant this amount, assigned certain accounts receivable of the bankrupt to defendant, the face value of which was $2,408.25, and on February 18, 1932, assigned certain other accounts receivable of the face value of $280.00. It was intended that this assignment of accounts receivable would pay the defendant's claim in full. But some subsequent charges and credits resulted in a small balance still owing to defendant of $43.83 (R. 64), though bankrupt's books show an overpayment of $9.40 (R. 95). At the trial,

$905.50 had been collected on these assigned accounts, and the court ordered judgment against defendant for that amount, and ordered that the remaining uncollected accounts be assigned by defendant to plaintiff. To the extent that these accounts were assigned as payment of an open account they were clearly preferential as appellant now concedes. Defendant complied with the court's ruling in part by assigning to plaintiff, before entry of judgment, all uncollected accounts receivable except three (R. 31-33). But defendant refused to assign over the said three accounts, and claims the right to hold them, on the theory that these accounts arose from the sale of clothing, by bankrupt, which was made up in part of cloth included in the alleged consigned merchandise

Plaintiff's Exhibit 2 (R. 65-66) shows that on the Thomas S. Allen account of $39.50 defendant has received $5.00; on the C. F. Lester account of $68.50 defendant has received $50.00; on the Lew Wallace account of $70.00 defendant has received $16.00. On these three accounts therefore defendant has collected $71.00 or 40% of $178.00 total, and claims the right to the balances aggregating $107.00. The value of the cloth used does not exceed one-third of the sales price of a suit (R. 91). Hence defendant has already received more than the cost of the cloth from the three accounts.

The most liberal interpretation of Clause Tenth of the contract contended for by appellant would not give the appellant an interest in any suit of clothes

greater than the cost of defendant's cloth that went into it. The record is silent in two points—1st, whether the cloth from these three suits came from Kemp-Booth and was part of the alleged consigned stock; and—2nd, the exact price of such goods; but it appeared from defendant's Exhibit A-11, received in evidence (R.102), that these three accounts were included in the twelve accounts (out of 35) based on Kemp-Booth Goods and that the cloth in the Lester suit was worth $16.24, and in the Wallace suit $12.90. Hence, upon what theory can defendant claim the right to hold the uncollected balance of these accounts. If not under Clause Tenth of the contract, then, only by virtue of the assignment. The uncollected balance of these accounts under Clause Tenth belonged to bankrupt, and passed to the plaintiff trustee. The assignment of these accounts to pay other indebtedness of bankrupt was a clear preference as to the uncollected balance of these three accounts, even if we adopt appellant's theory of the case.

Regarding the $227.23 Item

Regarding the $227.23 item, it is appellant's position that the judgment of the trial court should be reversed to the extent of $227.23, out of the $905.50 awarded by the court, as the amount of the actual cash collected by the appellant on assigned accounts receivable and retained by them. Appellant concedes that as to the balance of the $905.50 they are not entitled to a reversal.

Appellant concedes that if they have any right at

all to retain this money it must be found in paragraph Tenth of the contract. We respectfully submit that there is no language in this paragraph which, by any forced construction, could even be logically contended to support the position of appellant. Paragraph Tenth provides that the bankrupt might use these pieces of woolen cloth which are alleged to have been consigned, to make garments, and then says, "but in such case the title to all such garments shall remain in the party of the first part."

It appears from the testimony that the making of a woolen suit pattern into a suit of clothes for a man makes it necessary that it be cut up into about twenty-three small pieces which destroys its identity, as a piece of woolen goods, destroys its value as a suit pattern, and that after that it has little or no value unless built into a suit for the particular individual whose body it will fit Such construction of a suit requires that there be added to these small pieces of woolen cloth an equal number of various materials called trimmings or tailor's findings, and a considerable amount of labor, so that a suit which sells for $100.00 is made up of woolen which cost the tailor about $25.00, findings $6.00, labor $35.00, and that the balance of the $100.00 represents overhead expense and profit. In short, the value of the woolens going to make up a suit represents only one-fourth of its actual value.

Paragraph Tenth proceeds to say that, on the sale of any or all such garments, the party of the second part shall receive and retain for their services and

expenses in making up such garments, such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise. In other words, reducing these provisions to figures, on the sale of a $100.00 suit, Irving should receive $75.00 to cover his findings, labor, overhead and profit, and Kemp-Booth should receive $25.00 the assumed value of the woolens. The provision in regard to commission can be ignored here because both Mr. Garrett and Mr. Irving testified that no commission was ever paid or intended to be paid (R. 109, 97).

The provision above quoted that the title to all such garments shall *remain* in the party of the first part is, to say the least, very inept, because no provision is made for *transferring title* to the findings or labor or the finished product, which is a suit of clothes, to Kemp-Booth, and, strictly speaking, the only title to property which could *remain* in Kemp-Booth would be title to the woolens.

It is appellee's theory of this case that the value as well as the identity of the suit pattern was destroyed when it was cut up; that there is no provision in the contract which transferred title to any other part of the suit to Kemp-Booth; that the phrase "title shall remain" was not calculated, nor was it effective, to pass title to either the other constituent parts of the suit or to the finished suit, and did not so transfer title, to the finished suit, to Kemp-Booth; that as a practical solution of the question title to the

goods passed when they were delivered to Irving with permission to destroy their identity.

But appellant must go still further than the foregoing to sustain its right to retain the proceeds of these accounts receivable. There is certainly no language in Clause Tenth which gives appellant any lien upon the finished suit, nor upon any account receivable, in a case where the suit was sold on credit. This paragraph evidently contemplated that suits should be sold only for cash, so that there could be an immediate and instant division of the selling price.

There was never any such division of the selling price in any instance. There was a check up and billing for goods used once a month. Even when suits were sold for cash the money was deposited in the general bank account of the bankrupt. Approximately one-half of the bankrupt's business was on credit (R. 89). As collections came in on accounts receivable they were deposited in this same bank account. There was no trust fund, at any time, in which were set apart the moneys which it was provided in paragraph Tenth should be paid to appellant. By the appellant's waiving such provision for a period of one and one-half years, it is submitted, that the parties abandoned this provision if indeed it had ever been intended in the beginning that it should be kept.

It follows then that the only authority on which appellant can claim the proceeds of assigned accounts receivable is the authority included in the assignment itself.

The contention, raised in appellant's brief, that

title to the manufactured article was in appellant, is not only unsupported by the testimony but is thereby negatived. Neither the bankrupt nor the appellant ever so contended, and both the bankrupt and the appellant, in the court below, declared, that the title to the finished product was in the bankrupt. Mr. Irving testified:

> "If a suit was made up and refused by the customer, we paid Kemp-Booth for the woolens. If I used the goods I paid for them and if the customer who got the suit failed to pay, it was my loss. * * * If a customer failed to pay when due Kemp-Booth did not extend the time. * * * We never assigned to Kemp-Booth our interest in a suit made up. We never reserved with the customer a lien in favor of Kemp-Booth. We never delivered any finished suits to Kemp-Booth, nor did they ever claim such suits under paragraph 10 of the contract." (R. 96)

Mr. Garrett, appellant's Seattle manager, testified:

> "We understood that when the consignment account was placed in Mr. Irving's store it belonged to us; that Irving might sell a suit cut from the goods and deliver the suit to his customer; that when the suit was so delivered to his customer we did not own the suit. *We made no claim to the suit, but had a claim against him for the value of the goods.*" (R. 109)

Mr. Garrett's last statement above quoted appears to settle the question as to the rights of the parties on the sale of a suit to a customer by bank-

rupt. Kemp-Booth's claim for a suit pattern became an open account against the bankrupt, and we submit, that the very fact that appellant and bankrupt felt that an assignment of these accounts receivable was necessary, at the time they were assigned, and before this litigation was even thought of. is conclusive that it was the understanding of these parties, that these accounts receivable belonged to the bankrupt, whether they arose from Kemp-Booth materials or from materials purchased from other woolen houses, and that, therefore, these accounts receivable passed to the trustee, the appellee herein, and any moneys collected therefrom must be accounted for to him.

Regarding the 160 Suit Patterns

What we have said, we consider, disposes of the questions raised by appellant, with the exception of title to the patterns delivered by appellant to the bankrupt, and subsequently repossessed by appellant. A discussion of this question necessitates a somewhat thorough investigation of the law relating to consignment contracts, and the distinction made by the courts between a sale and an agency to sell; and between a contract of bailment, a conditional sales contract and an absolute sale.

This being an equity case the court will doubtless feel it necessary to read the testimony introduced at the trial, which, we submit, shows, that, regardless of the terms of the written contract between appellant and the bankrupt, it was the intention of the parties, as borne out by their conduct, over a period of

a year and a half, that these goods were delivered to the bankrupt by appellant, not for sale, but for only one purpose, namely, consumption, in the manufacture of men's clothing, which clothing was not to be returned to appellant, but, in every instance was sold to a customer of the bankrupt before the woolens were cut up, under a special contract to manufacture a suit of clothes to fit a particular customer; that appellant invested the bankrupt with all the evidences of ownership of said woolens; and, by this alleged consignment arrangement, filled the shelves of the bankrupt with up-to-date woolens, which bolstered up his credit and actually prevented his failure in business, or rather deferred such failure for a year-and-a-half, during which time at least four subsequent creditors, in large amounts, were created by the bankrupt; and that the return by the bankrupt to appellant, a few days before he closed his doors, and made a common law assignment for the benefit of creditors, operated as an actual fraud upon these subsequent creditors, at whose instance the trustee in bankruptcy, later appointed, is vested with authority to bring this suit for the benefit of all creditors to recover said goods or their value. In short, we state at the outset of our argument that we believe that the evidence shows that this agreement, *called* a consignment agreement with a reservation of title, *was a sham* to conceal an entirely different transaction.

Contract was a Sham

We adopt the analysis of the contract made by

counsel for the appellant, appearing on pages 3, 4 and 5 of the opening brief The contract contains ten paragraphs. The analysis of appellant and our comment thereon follow:

> "1. First party agrees during the life of the agreement to consign from time to time such of its goods to second party as are suitable for sale by first party to second party."

Mr. Irving testified :

> "The contract no doubt reads that I have the right to sell suit patterns, but I interpret the meaning of the contract to be that I could not sell any of their materials; that is, to sell it as material, because that was their business. I was not supposed to sell woolens and did not, either of theirs or any other. I was in the tailoring business and did not sell woolens to anyone. I never sold any of Kemp-Booth Company's woolens." (R. 90)
>
> "2. The value of said goods in the possession of second party shall at no time exceed $3000.00."

The amount of goods placed in the possession of the bankrupt by appellant and the amount of money owing by the bankrupt to appellant gradually increased, until, at the time appellant took possession of the one hundred and sixty suit patterns, immediately prior to bankruptcy, there was due and owing from the bankrupt to appellant $3,104.20 (R. 95), exclusive of the value of the one hundred and sixty patterns on hand. The patterns repossessed are stipulated to have been worth $1,652.23 at the time of the

trial, which was two-thirds of their invoiced value, or $2,202.97 (R. 109). The court entered judgment for $3,581.66 with interest and costs. The second paragraph of the contract was constantly violated by the parties.

"3. Second party shall receive such commission for selling the same as may be stipulated by first party."

Mr. Irving testified:

"No commission was ever allowed, paid or mentioned." (R. 97)

Mr. Garrett testified :

"We never paid him any commission. It was not contemplated." (R. 109)

"4. Second party shall account to and settle with first party on the first day of each and every month during the life of the agreement, at the sale price fixed by first party, for all merchandise covered by the agreement and sold during the previous month, less commission. Second party guarantees the collection and prompt payment on the first day of each month of the sale price of all merchandise sold during the previous month."

Mr. Irving testified:

"We never made a report of our sales of suits to Kemp-Booth, neither a list of customers, nor the price of sales. They never asked us to do so. (R. 91)

"Cash received from suits was deposited in the bank to the credit of the House of Irving. We

had no separate bank account in which we kept money for Kemp-Booth. For suits sold on credit we billed the customer on the House of Irving billhead. Moneys coming in on suits made from Kemp-Booth materials went into our general bank account. In this bank account we mingled the proceeds of all sales of clothing whether made up from Kemp-Booth goods or otherwise. The money that came in was ours. (R. 89)

"If a suit was made up and refused by the customer, we paid Kemp-Booth for the woolens. If I used the goods I paid for them; and if a customer who got the goods failed to pay, it was my loss. I was supposed to pay at the end of the month for materials used during the month. If a customer failed to pay when due, Kemp-Booth did not extend the time. They knew nothing about my affairs in that respect, nor did anyone else." (R. 96)

Mr. Garrett testified:

"We understood that when the consignment account was placed in Mr. Irving's store it belonged to us; that Mr. Irving might sell a suit cut from the goods and deliver the suit to his customer; that when the suit was so delivered to his customer, we did not own the suit. We made no claim to the suit, but had a claim aainst him for the value of the goods." (R. 109)

No accounting was ever required, and settlement was not made on the first day of each month for

goods consumed. The bankrupt was billed on open account, and paid as and when he could.

> "5. Second party shall furnish first party a monthly inventory of the exact merchandise held by it for first party on the first day of the month, beginning September 1, 1930."

The evidence fails utterly to show that the bankrupt furnished appellant with any inventory whatever. He furnished no inventory, either on the first of the month, or, at any other time, and the only record kept was on the "control cards" of appellant; and when the periodic check-ups were made, suit patterns which were not in the possession of the bankrupt were charged on open account to the bankrupt.

> "6. Second party shall insure all the merchandise against loss by fire and burglary in policies running to first party, and keep the merchandise segregated from other merchandise on the premises."

No burglary insurance was taken out. The bankrupt's goods were insured against loss by fire in the sum of $3,000.00 in favor of the House of Irving and the loss, if any, payable to Kemp-Booth, as its interest might appear; otherwise to the insured. This is not an insurance policy running to the appellant. Mr. Irving testified that the goods were mingled with goods obtained from other sources, and, that it was impossible to keep them segregated. The only way to determine whether goods originated with appellant was to take down every bolt of the stock out of the shelves and check each piece of cloth by examining the tag affixed to each bolt (R. 91).

"7. Either party may terminate the agreement by giving three days' written notice, and at termination all of the goods of the first party in the possession of second party shall be returned to first party."

There was no termination of the agreement except the seizure of the bankrupt's stock by appellant, forming the basis of this litigation.

"8. First party shall have the right to check up and inspect and/or withdraw any or all of the merchandise at any time without notice."

This provision was never carried out, with the exception that periodically, and, at more or less irregular intervals, appellant sent a man to bankrupt's store to check the stock. While there was a constant exchange of merchandise, there were no withdrawals within the meaning of this section.

"9. The title to all such consigned merchandise shall remain in the party of the first part and second party shall have no title thereto, but the right to sell the same for the first party under the terms and conditions stated. Prices and terms on which the same may be sold are to be furnished from time to time by first party."

Mr. Irving testified that he never sold any of Kemp-Booth Company's woolens and that he interpreted the meaning of the contract to be that he could not sell any of their materials and he was not supposed to sell woolens, either those originating from Kemp-Booth or from other sources (R. 90). No prices and no terms on which the woolens furnished by the appellant were to be sold by the bankrupt were ever

furnished. The suits manufactured by the bankrupt were made for bankrupt's customers at prices agreed on between the bankrupt and each customer. Appellant was not interested in the price charged by the House of Irving for suits; did not fix the prices therefor, and had nothing whatever to do with them. The interest of the appellant was confined to receiving payment for the merchandise furnished at the invoice price (Testimony of James H. Garrett, R. 107; testimony of J. H. Irving, R. 91).

> "10. The party of the second part shall have the right, until otherwise directed in writing by the party of the first part, to make up any part or parts of said merchandise into garments; but in such case the title to all of such garments shall remain in the party of the first part, and on the sale of any and all such garments the party of the second part shall receive and retain for his services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein as well as the usual commission on such merchandise."

Title to the manufactured suits was never claimed by appellant. Mr. Garrett testified that Mr. Irving might sell a suit cut from the goods and deliver the suit to his customer; that when the suit was so delivered to a cutsomer appellant did not own the suit; and had no claim against the suit, but had a claim against the bankrupt for the value of the woolens used in the manufacture (R. 109). He also testified:

> "The net profit he made on the suit was to be

the commission. We never paid him any commission. It was not contemplated." (R. 109)

The appellant never at any time owned the materials going into and making up a completed suit. The woolen material so used did not constitute more than one-third of the price the consumer paid for the suit, and the remainder being composed of tailor's findings or trimmings, buttons, thread, labor, overhead and profit. Title to the completed garment could not *remain* in appellant, because it never vested in appellant.

The contract was not carried out between the parties in any essential particular; it did not meet, and could not be made to meet, the necessities of the business conducted between the bankrupt and appellant. Mr. Irving testified that he acted entirely under the tenth paragraph of the contract (R. 90), but the testimony is conclusive that neither the bankrupt nor appellant considered that paragraph operative, and neither of them complied with its plain provisions.

So the case discussed in the opening brief is not the case before the court. The contracting parties did not comply with the contract and never intended to comply with it, for at no time did the appellant attempt to exercise any of its rights thereunder and never did the bankrupt admit that appellant could exercise such rights. The case discussed in the opening brief is fictitious. Possibly it is what the case might have been, had the contract been entered into and carried out, in good faith, in its essential particulars; but the contract was never considered effective by the parties and both the bankrupt and the

appellant admit a course of conduct which negatives any possibility of the transaction being held by the court to be other than an absolute sale, insofar as the trustee in bankruptcy is concerned.

Quite a similar case is *Yarm v. Lieberman*, 46 Fed. (2d) 464 (466) (D. C. N. Y.), where the court, finding that the parties had ignored the terms of a contract which purported to be a consignment, held that it was a sale, and said:

> "Upon the whole case, it is believed that this contract was entered into solely to provide an excuse for the removal of merchandise in the event that the bankrupts should come to financial difficulties, and that it was not such an open and aboveboard transaction as should be permitted to stand in the face of the rights of creditors who did not resort to such methods in their dealings with the bankrupts."

We now proceed with the argument on the law points involved.

A Secret Consignment of Woolens to a Tailor for Consumption Is Not Possible in Washington

On page 29 of appellant's brief is contained the following frank declaration:

> "In fact, if the contract had provided that upon the manufacture of the suit the title to the manufactured garment passed to the tailor to be by him transmitted to the ultimate purchaser, the contract instead of being a contract of consignment and agency would have been a contract with an option to purchase. If this con-

tract is invalid then it is not possible for wholesale woolen houses to consign their merchandise to merchant tailors."

AT THE OUTSET OF APPELLEE'S ARGUMENT UPON THE LAW WE ACCEPT THIS CHALLENGE AND DECLARE IT TO BE OUR OPINION THAT IT IS IMPOSSIBLE, UNDER THE LAWS OF THE STATE OF WASHINGTON, FOR A WOOLEN HOUSE TO CONSIGN TO A MERCHANT TAILOR, FOR CONSUMPTION IN MANUFACTURING GOODS FOR HIS CUSTOMERS, WOOLENS UNDER A SECRET AGREEMENT WHICH SEEKS TO RESERVE TITLE IN THE WOOLEN HOUSE AS AGAINST SUBSEQUENT INNOCENT CREDITORS OF THE ALLEGED CONSIGNEE AND AS AGAINST A TRUSTEE IN BANKRUPTCY REPRESENTING SUCH CREDITORS. We take this position because Section 3790 of Volume 5 of Remington's Revised Statutes, Annotated, of Washington, provides:

> *"That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to all bona fide purchasers, pledgees, mortgagees, encumbrancers and subsequent creditors, whether or not such creditors have or claim a lien upon such property, unless within ten days after the taking of possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county*

wherein, at the date of the vendee's taking possession of the property, the vendee resides."

We call the court's attention particularly to the phrase "containing a conditional right to purchase." The evidence in this case, as well as the brief of appellant, settles beyond any question of controversy that title to these woolens vested in the House of Irving, and these goods were, by them, manufactured into suits of clothing, and title to the finished suits passed from House of Irving to their customers, in every instance, under a special contract of manufacture, which was made between House of Irving and the customers, before the materials for the suits were ever cut out, and to which contract appellant was not a party.

We contend that it was the intention of the parties that title to the alleged consigned woolens was intended to be passed from Kemp-Booth to House of Irving and from the House of Irving to the customers of House of Irving, and that it was never intended that House of Irving should be an agent for the transfer of title direct from Kemp-Booth to the customers. It follows, then, that if there was a contract, either written or oral, governing these woolens, that contract was a contract for the sale of the woolens to House of Irving. Whether it was an option to purchase or a sale outright under which the purchase price was not to be paid until the merchandise was actually used by House of Irving, it would nevertheless be *a contract containing a conditional right to purchase*, and unless filed within ten days after the taking of possession by the vendee, such sale would

be absolute as to subsequent creditors, which in the case at bar are represented by the trustee in bankruptcy. It was not filed within ten days, or at all. We respectfully submit that this case could be decided upon this point alone in favor of appellee without further consideration of authorities. The learned Trial Court based his decision in part upon this ground (R. 17).

The Contract Was a Sale For Consumption, Not a Consignment For Sale

The distinction between sale and agency to sell has been stated by courts and authorities.

> "The *essence of sale* is, as has been seen, the transfer of the title to the goods for a price paid *or to be paid.* Such a transfer puts the transferee, who has procured the goods to sell again, in the attitude of an owner selling his own goods and makes him liable to the first seller as a debtor for the price, and not, as an agent, for the proceeds of the resale. The *essence of agency to sell* is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to recall the goods and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a *price* for them before sale or unless sold by the agent."
>
> I Meacham on Sales, Sec. 43.
>
> "The recognized distinction between bailment

and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale. * * * The agency to sell and return the proceeds, or the specific goods if not sold, stands upon precisely the same footing, and does not involve a change of title. An essential incident of trust property is that the trustee or bailee can never make use of it for his own benefit."

Sturm v. Boker, 150 U. S. 312, 329, 37 L. Ed. 1093, 1100.

This rule of distinction was later reaffirmed in the case of *Luvigh v. American Woolen Co. of N. Y.*, 31 A. B. R. 481, 231 U S. 522.. In that case woolen goods were consigned to an agent for sale. The proceeds of sale were to be accounted for. The consignor kept a bookkeeper in the consignee's office to see that the agreement was kept. The court found that there was neither actual nor constructive fraud and that the agreement was a consignment as it purported to be. The consignee was a legitimate jobber of woolens, not a tailor consuming the woolens as in the case at bar.

"To constitute a sale, there must have been in the contract a vendor and a vendee, and a

> provision for a transfer of property by the vendor to the vendee, and an obligation by the vendee to pay an agreed price therefor, *or the circumstances outside of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale.*" (Italics ours)
>
> *Gen. Electric Co. v. Brower*, 34 A. B. R. 642 (648) 221 Fed. 597 (602) (9th Cir.).

In that case the agent was required to transact business openly as agent for the manufacturer, account for the proceeds of sales less a discount agreed upon; the goods consigned and sale prices to be determined by consignor. The court found that there were no circumstances outside the contract of a fraudulent character.

The case of *Miller Rubber Co. v. Citizens etc. Bank*, 37 A. B. R. 542 (546) 233 Fed. 488 (491) (9th Cir. 1916) involved a contract which, on its face, was denominated a consignment of rubber tires. The agent was not only permitted to mingle the consigned goods with his own stock, but the contract expressly provided that the consignors would furnish the consignee "free of charge all samples of tires and accessories and necessary advertising matter, imprinted with the name and address of consignee." The court reaffirms the rule above quoted from *Gen. Elec. Co. v. Brower* (*supra*) and held:

> "It is difficult to see how the consignors could have more effectually held the consignee out to its customers as the real owner of the consigned

> property. To permit them to retake from the stock of the bankrupt the remaining portion of the consigned goods would, in our opinion, operate as a fraud on the creditors of the bankrupt."

The court held that these and other circumstances found in the case showed that the contract was a fraudulent concealment of an actual sale. Among such were failure of consignor to fix the resale price and provide for remittance by consignee of proceeds of sales; but instead consignee was to pay a fixed price for the consigned merchandise as same was resold.

In re *King*, 45 A. B. R. 95, 262 Fed. 318 (9th Cir. 1920) this court reaffirmed the rule laid down in above cited cases and affords two instances of consignments of rubber tires which were handled throughout as consignments should be handled "and there was no act of the consignor that can be properly held to have enabled the consignee to commit any fraud upon the public."

It appears, therefore, that in determining whether the transaction in the case at bar is a consignment or a conditional sale, our inquiry must extend not only to the terms of the written instrument but also to the circumstances outside the written contract and the conduct of the parties thereunder.

Tests Showing Consignment or Sale

Despite the many cases where the courts have had to determine the question whether a transaction was a consignment or a sale there has been no formula

worked out which has been accepted as a universal test for all cases. Many partial tests have been applied and adopted by the courts. Often the facts of a transaction have some elements pointing to a consignment and others indicating a sale. When conflicting elements are present the courts are forced to decide what was the dominant purpose of the parties. The following appear to be the tests deemed most important by the courts:

Elements of Relationship Which Point to Consignment Points or Earmarks	Elements of Relationship Which Point to Conditional Sale Points or Earmarks
1. Reservation of title, bona fide, Title passes directly from consignor to purchaser.	1. Reservation of title for purpose of securing the debt. Title passes to alleged consignee and from him to purchaser.

Reservation of title in consignor or alleged consignor is so universal in both classes of cases that it is not considered as a test but is almost taken for granted. If such reservation should be absent the omission would be fatal to claim of consignment. If present it is not conclusive, but the court will inquire into the other features of the case.

2. Restriction on sales either (1) to a prescribed class of persons or (2) in a prescribed territory, or (3) for prescribed prices, or (4) for cash only, or (5) as to terms of credit, either open account or notes.	2. No restrictions usually.

3. Upon termination of contract all unsold goods to be returned to consignor under all circumstances.	3. Alleged consignee may agree to either (1) pay for the unsold goods or give note, or (2) have option of paying for goods or returning same. Sometimes return of goods settles the debt; sometimes the goods are resold and if they bring a less price the alleged consignor has to pay the difference.

Mere agreement to return goods is equally consistent with either consignment or conditional sale, with reservation of title to secure purchase price.

4. Reports of sales made at stated intervals by agent to principal giving names and addresses of purchasers, sales prices, terms, etc.	4. Total absence of such reports or bare reports of sales without any details as to identity of purchasers or sales prices or terms or failure of alleged consignee to insist upon compliance with such a provision.
5. Reservation in consignor of title to any moneys, accounts, notes, etc., resulting from sales, as trust funds.	5. Total absence of such reservation or failure to insist upon compliance with such a provision.
6. Accounting at stated intervals by agent to principal for all proceeds of sales either turning cash and notes and accounts over to principal or making other satisfactory accounting therefor.	6. Payment from time to time by alleged consignee to alleged consignor of money in lump sums similar to payments made to other creditors.
7. Consigned goods kept separate from other goods of agent.	7. Alleged consigned goods mingled with other goods of alleged consignee.

8. Proceeds of sales of consigned goods kept separate from the other moneys of agent and held as separate fund in trust for consignor.	8. Proceeds of sales of alleged consigned goods mingled with other moneys of alleged consignee with knowledge of alleged consignor. Remittances made to alleged consignor out of these mingled moneys. Also other creditors and expenses of business paid out of said mingled funds.
9. Business done by consignee openly as agent of consignor. Public generally, customers and other creditors given notice by signs on premises, stationery bill heads and correspondence and/or instrument of record gives constructive notice.	9. Agreement is secret. Public not given actual or constructive notice. Alleged consignee deals with public, other creditors and customers as though the alleged consigned goods were his own. Alleged consignor acquiesces.
10. Agent sells goods for a price fixed by his principal and he has no discretion as to fixing price or terms of credit, etc.	10. Alleged consignee sells for any price he sees fit. He has to pay alleged consignor a fixed price for the goods sold. He determines the terms of credit he will extend and to whom credit will be extended. He pays for the goods sold at stated intervals regardless of whether he has collected the purchase price.
11. Agent usually receives for his compensation a commission computed on actual sales and remits the balance of moneys collected to his principal. Sometimes there is a division of profits in lieu of a fixed commission.	11. Alleged consignee usually pays a fixed price for the goods. If he sells for more or less than this price he enjoys the profit or bears the loss. If a credit customer does not pay he stands the loss.

12. By frequent check-up of goods and insistence upon agent's compliance with all the terms of the trust or by constant supervision, such as keeping a bookkeeper on the premises, the relation of principal and agent is preserved and principal's control of goods and proceeds is maintained.

12. Either there is no intention of the parties to create and preserve the relation of principal and agent and a trust as to the goods and their sales proceeds, or the parties neglect to preserve such relation and trust.

Mere check-up on reported sales is equally consistent with either consignment or sale on extended credit with reservation of title to secure purchase price, where the goods are to be paid for as fast as they are resold.

13. The consignor bears the burdens of ownership such as freight, expressage, taxes, insurance, depreciation, and assumes the risks of fire, theft, bad credits, and loss from sale below original invoice.

13. The alleged consignee is usually required to bear some or all of these burdens and losses.

It is not necessary that all of the earmarks of a sale be present to make it a sale; nor all of the earmarks of a consignment to make it a consignment. The presence or absence of one or more of these earmarks is merely evidence which should be given weight. In most of the cases there are some elements indicating a sale, and also some indicating a consignment. Where the evidence is conflicting it has sometimes been difficult for the court to determine on which side the evidence preponderates.

There are three of the so-called tests which are not real tests at all, because they are invariably pres-

ent in every contract of consignment and in every contract of conditional sale. These tests are:

1. Reservation of title.
3. Return of goods if not resold or paid for.
12. Check-up on reported sales where the goods are to be paid for as fast as they are resold.

But where every one of the ten other real earmarks of a consignment are missing and every one of the ten real earmarks of a sale are present, as is the case here, and where the goods are not even intended for sale by the alleged consignee, but for consumption by him, or manufacture into an article to be sold by him and not returned to alleged consignor, we submit the evidence is all one way and supports the decision of the learned Trial Court that this was a sale and not a consignment.

Hence we shall not attempt to take up, case by case, the authorities cited by learned counsel for appellant, showing that the courts have sustained agreements, as consignments, where one or more of these ten earmarks happens to be missing, but content ourselves with the observation that, in every case where the court held the transaction to be a consignment, there appeared to be a clear preponderance of evidence supporting the theory of consignment, and not a total absence of such evidence, as in the instant case.

Earmark or Point I—Reservation of Title

There was no valid consignment of the suit patterns returned. This was a conditional sale. The secret reservation of title in Kemp-Booth was a constructive

fraud upon subsequent creditors and not enforceable against the Trustee in Bankruptcy,

The Trustee in Bankruptcy is vested by law with the rights of subsequent execution creditors to recover property or its proceeds transferred in fraud of such creditors, although his recovery would be for the benefit of creditors generally.

In re Sachs, 30 Fed. (2d) 510 (515) (C. C. A. 4th Cir. 1929);

In re Moore (C. C. A. 4th) 11 Fed. 2d) 62;

Globe Bank v. Martin, 236 U. S. 288, 35 S. Ct. 377, 29 L. Ed. 583;

Ludvigh v. Amer. Woolen Co., 231 U. S. 522, 58 Law Ed. 345.

The courts uniformly hold that, in determining whether the contract was one of agency or consignment or bailment, on the one hand, or of sale, with reservation of title, by way of security, on the other, the courts will be *controlled* not by the terms of the contract, which is often found to be a cloak to conceal the real intention of the parties, and to mislead creditors, but rather the court will take into account (1) the contract the parties intended to make, (2) what they agreed to do, and (3) what the parties actually did, either in living up to the terms of the contract, or otherwise.

All these elements, considered together, will reveal the actual nature of the transaction.

> "There is no particular magic in the term 'consigned' or 'consigned account.' In a sense all goods shipped to another are consigned to

him. The question is what was the inherent character of the transaction, which depends upon the purpose of it. Were the goods put in the hands of the one party by the other, to be sold for him and on his account, creating the relation of principal and factor; or were they turned over to such party, to be treated and disposed of as his own, being responsible to the other simply for the price? In the one case we have a trust or bailment, the goods throughout being those of the consignor or principal, as well as the moneys received from them. In the other there is a sale; the superadded condition, sometimes appearing, that the title shall not pass until the goods are paid for, amounting to nothing as a restriction upon it."

In re Wells, 140 Fed. 752 (Dist. Ct., M. D. Penn., 1905)

"In determining whether the contract was one of agency and consignment, on the one hand, or a sale with reservation of title by way of security, on the other, it is apparent from the decisions of the courts, and especially those of our own Court of Appeals, that no one test can be applied, but that each case must be carefully and separately considered. In the final analysis we must take into account what manner of contract the parties intended to make, what they agreed to do, and the manner in which they carried it out in actually working under it. All of these must be considered as an entirety, for the

purpose of determining the actual character of the transaction."

In re National Home & Hotel Supply Co., 226 Fed. 840 (844) 35 A. B. R. 139 (144)

"The question for consideration, therefore, is whether the contract is one of sale or of consignment for sale. The provisions of the contract are not entirely consistent with either theory. * * * Bearing in mind that the terms of the instrument do not fully support either contention, it is necessary to ascertain and give effect to the dominant thought, regardless of formal statement, for the true nature of the transaction depends less on the terms in which it is described than upon the rights and liabilities it creates."

The District Court held the contract to be a sale.

In re Eichengreen (Dist. Ct. Md. 1927) 18 Fed. (2d) 101 (104).

On appeal the Circuit Court (4th Cir. 1928) affirmed the District Court, saying in part:

"While it is true that the paper writing is called a consignment, and that the bankrupt agreed to act as consignee, factor, or agent for the sale of the Shoe Company's merchandise, still the contract must be construed from a careful consideration of the entire language employed in the document, and the court is not bound by the name which the parties see fit to term themselves in the contract. It is less difficult to arrive at a proper construction by determining the benefits accruing and the burdens borne by the

parties." The court concluded that the contract could not, under the circumstances, be a contract of consignment.

Reliance Shoe Co. v. Manly, 25 Fed. (2d) 381 (383).

"In all the cases it is held that the relation of the parties as principal and agent or as vendor and vendee is determined by the nature of the transaction, and not by the name which they give it, and the use of the words 'agent,' 'commissions,' etc., is of little significance. If the goods are delivered to the 'consignee' under such circumstances as to confer upon him absolute dominion over them, and he becomes bound to pay a stipulated price for them at a certain time, or upon the happening of any future event, the transaction amounts to a sale and delivery, and the title passes to him."

Buffum v. Descher (Neb.) 96 N. W. 352 (353).

The future event in that case was resale of the goods, as in the case at bar it was the use of the goods in the bankrupt's business.

"The whole contract appears from the two papers: the one headed 'terms of consignment' and signed by Peek & Son, and the other headed 'consignee's agreement' and signed by F. K. Hill. It is true the words 'consignor' and 'consignee' appear sufficiently conspicuous, but these are merely labels which the parties have placed upon the transaction. We must look within to see its

real nature. * * * It is immaterial what the parties designate it."

Peek v. Heim (Pa.) 17 Atl. 984.

"Whatever the form of the agreement, if its purpose was to cover up a sale and preserve a lien in the vendors for the price of the goods, it was void as respects creditors, whether the credit was given before or after the delivery of the goods. A consignment for such object was no better than any other device."

Thompson v. Paret, 94 Pa. St. 275 (280).

Where, as in the case at bar, title passes from the consignor to consignee and from the latter to the purchaser, it is regarded as a dominant element. Reservation of title is regarded as for the purpose of securing the debt and the relationship is that of conditional sale, not consignment.

"It appears to me that the real question is, when Nevill sold the goods, did he sell them as the agent of Towle & Co., so as to make Towle & Co. the vendors, and the persons to whom he sold, purchasers from Towle & Co.?—or did he sell on his own account? * * * and no doubt it requires a very minute examination of what the course of business is, to distinguish between a *del credere* agent, and a person who is an agent up to a certain point, that is to say, until he has sold the goods, but who, when he has sold the goods, has purchased them on his own credit and sold them again on his own account. * * * I apprehend that a *del credere* agent, like any other

agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; and he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; and therefore, if he sells at the price at which he is authorized by his principal to sell, and upon the credit which he is authorized by his principal to give, and the customer pays him according to his contract, then, no doubt, he is bound, like any other agent, as soon as he receives the money, to hand it over to the principal. But if the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time—in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different, and at a time which may be different from those fixed by the contract. * * * He is to undertake to pay a certain fixed price for those goods, at a certain fixed time, to his principal, wholly independent of what the contract may be which he makes with the persons to whom he sells; and my opinion is that, in point of law, the alleged agent in

such a case is making, on his own account, a contract of purchase with his alleged principal, and is again re-selling." Mellish, Justice.

From *ex parte White*, L. R. 6, Chan. App. 397 (402-403).

"The distinction between sale and an agency to sell is ordinarily clear and simple, but, unfortunately, many cases are presented in which the parties, for the purpose of evading the operation of some local statute, of defeating the claims of creditors, or otherwise, have made contracts involving such a confused jumble of the elements of both sale and agency that it is exceedingly difficult to determine their true character. Certain of these contracts have evidently been framed for the purpose of concealing a sale under the guise of an agency, while others have been drawn with a view to having them construed as contracts of sale or agency as might best suit the convenience or subserve the purposes of the framers.

"In construing these anomalous instruments, courts look chiefly at the essential nature and preponderating features of the whole instrument and not at the peculiar form of isolated parts of it. It matters very little what the parties have chosen to call their contract. * * * If the parties have made a contract which really operates to transfer the title, it is a sale, notwithstanding they may have labeled it a 'special selling factor appointment,' or have expressly stipulated that the alleged factor 'shall never purchase such

goods for his own account.' So with regard to the use of the term 'consign': it may express the true state of the case, and, if so, it will be given effect; or it may be a mere subterfuge, and if it be the latter 'there is no magic in that word which can take from the transaction its real character'."

I Meacham on Sales, Sec. 46.

Such a secret contract of conditional sale, while it may be good, as between vendor and vendee, is void, as in fraud of subsequent creditors, or the Trustee in Bankruptcy.

The dominant idea behind the contract in the case at bar was a device for the extension of credit to the bankrupt. The inherent character of the attempted consignment was a sale of goods for consumption—cloth to be incorporated into garments—with a secret restriction that title should not pass until the goods were paid for. It is inconsistent with the continued ownership of the vendor. It is fraudulent and void as against subsequent creditors of the bankrupt. Where there is such a dominant idea behind a contract it is controlling.

In re Penny & Anderson (Dist. Ct. S. D. N. Y.) 176 Fed. 141 is a case nearly on all fours with the case at bar. In that case a stock of wines and liquors were "consigned" to bankrupts, who conducted a restaurant, for use therein. The agreement provided that title should remain in consignor until the full indebtedness of the bankrupts should be paid. There was no restriction on the sale of the liquors by the

bankrupts, as to price or otherwise, and no provision respecting the disposition of the proceeds.

Held, that the transaction was not a consignment but a sale, and the attempted retention of title in the seller void, as against creditors, and that claimants could not reclaim the property from the trustee in bankruptcy.

In the opinion of Dexter, Special Master, adopted by the court, it is said (p. 143):

> "I am of the opinion, and so report, that the petition should be dismissed, for the reason that the inherent character of the attempted consignment was a sale of goods for consumption, with a secret restriction that title should not pass until the goods were paid for, which is inconsistent with the continued ownership of the vendor, and is fraudulent and void as against creditors of the bankrupt."

Another court has said:

> "When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee."
>
> *In re Garcewich* (Cir. Ct. of App., 2nd Cir. 1902),115 Fed. 87 (89).

> "Contracts of sale, under which title is to remain in the vendor, although the vendee may consume the goods, or sell them and apply the proceeds to his own use, are fraudulent as to

creditors, because the stipulation that the title is to remain in the vendor is entirely inconsistent with the purpose of the contract."

Ludvigh v. American Woolen Co., 188 Fed. 30 (33), affirmed by Supreme Court in 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345.

"The purpose and intent of the parties and the legal effect as to third parties of what they agreed to do, may be best determined from the transactions authorized or contemplated to be performed by force of the terms and conditions of their contract. Thus construed, and its provisions considered in the same consecutive order as the acts under it were to be performed rather than in the order in which the provisions were incorporated in the agreement, we find: * * *"

Peoria Manuf'g Co. v. Lyons, 38 N. E. 661 (Sup. Ct. Ill.).

The *Laflin and Rand Powder Company v. Burkhardt*, 97 U. S. 110 (116), 24 L. Ed. 973, is a case in point:

Action in trover.

Certain acids and other articles were seized upon Burkhardt's execution issued on a judgment against Dittmar. Plaintiff recovered the value of the goods, so sold, in the lower court.

Dittmar was an inventor, and had the exclusive right, under patents, to manufacture certain explosives. He did not have the capital to carry on the manufacturing business. The Laflin and Rand Powder Company entered into a ten-year contract with

him to furnish certain money, each month, and the acids and other materials required to manufacture the explosives, or money to purchase same, they to be reimbursed for such advancements out of the sale price of the explosives, and any profits to be divided equally between them. The acids and other property seized by Burkhardt were nearly all articles furnished Dittmar under this agreement. The plaintiff claimed title on the theory that this was a consignment of raw materials to be manufactured by Dittmar and that title did not pass. The court said:

> "The plaintiff in error contends that the present is the case of a bailment, and not of a sale or loan of the goods and money to Dittmar. It is contended that a question of bailment or not is determined by the fact of whether the identical article delivered to the manufacturer is to be returned to the party making the advance. Thus, where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer. We understand this to be a correct exposition of the law."

The agreement provided among other things that

the Powder Company is to furnish Dittmar, upon his requisition, all the raw materials needed to manufacture said explosives, or furnish Dittmar the money necessary for the purchase of said materials; the said advances and the cost of the raw materials are to be charged to Dittmar, against the manufactured goods, *to be consigned to the Powder Company.*

The court said:

> "The case is quite different from the single mechanical transaction of turning specific logs into boards, or a specific lot of wheat into flour." * * *
>
> "No one could lawfully use Dittmar's process for the manufacture of 'dualin' except himself. No one could lawfully sell it when manufactured, except himself. It was lawful for him to mix these materials and to produce the compound, but it was not lawful for the Powder Company to do so. It is, then, at least a fair argument to say that when materials were sent and delivered to him, to use in a manner which he only was authorized to use and to produce a result which he alone was authorized to produce, that both the process and the materials, when there was no stipulation to the contrary, should be taken to be his."

The court also said:

> "While it has been held that the expression 'to be consigned to the party of the second part' is not sufficient to show ownership in the party consigning, yet the general rule is conceded, that the party consigning goods is the presumed owner of them, and it may be taken into con-

sideration in giving construction to a doubtful instrument. In this transaction, as has been already observed, there is no agreement to return or deliver the goods, but the word 'consign' is evidently used in its place."

The judgment of the lower court was affirmed.

Where raw materials are delivered by one to another for manufacture it is a sale unless the finished product is to be returned to the one furnishing them.

In the case at bar the title to the woolens was attempted to be reserved in Kemp-Booth, but such reservation was inconsistent with the permission given House of Irving to manufacture these woolens into garments to be sold to its customers, such reservation of title being inconsistent with passing of good title to the purchasers, on sale of said garments.

In *Potter v. Mt. Vernon Roller Mill Co.*, 101 Mo. A. 581, 584, 73 S. W. 1005, defendant owned a flouring mill, and, in connection therewith, an elevator in which wheat, of varying grades, was received from different owners, for storage, without charge, commingled in a general bulk, and taken out by defendant both for sale and for manufacture into flour. Defendant would return to depositors, at their option, wheat or its market value, or its market value in flour or bran, or cash, but no return of the identical wheat delivered was expected or made. Plaintiff and his assignors received slips of paper containing the name of the party delivering the wheat, the date, and the quantity delivered. The evidence showed that the plaintiff was to receive flour and bran for his wheat, and his assignors were to be paid, in cash, at the

market rate. The elevator and the wheat therein were destroyed by fire. Held, to constitute a sale, and plaintiff, in the lower court, recovered the value of the wheat.

It was contended, on appeal, that this transaction was a bailment. The court said:

> "It is well settled that where a warehouseman has received grain on deposit for its owner, in a common granary or depository, where it is mingled with other grain of himself or others, or both, in such receptacle, to which, from day to day, other grain of various owners, of like kind and quality, is added, and from which, from time to time, sales and delivery of grain are made, and the warehouseman keeps constantly on hand grain of the quality received, prepared for delivery on call to all depositors, the contract is a bailment, and not a sale. The circumstances that the identical grain is commingled with other grain, and is not to be returned to the depositor, but a like quantity of the same kind and quality are not sufficient to convert the contract into a sale (Citing cases). But the law is equally well settled, and supported by overwhelming weight of authority, that where there is no obligation to return the specific article to its original owner, nor to restore to him property of like quality, and the receiver is free to return another thing of value, he becomes a debtor, and owner of the property delivered. The distinction is thus recognized by the highest tribunal of America."

Then follows the quotation from the opinion of the

Supreme Court of the United States in the case of *Powder Co. v. Burkhardt*, beginning:

> "Thus where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper" etc.

above quoted. And after citing other authorities the court added:

> "In brief, the distinction recognized by the above and other authorities is that, to create the relation of bailor and bailee, it is imperative that the agreement, whether by express contract or implied by law, shall intend that the property received by the bailee shall be returned to the bailor."

We cite this case, not, as being in point with the case at bar, but as illustrating the principle of law that title to the cloth furnished by Kemp-Booth could not be reserved, in the form of the clothing, of which it was intended to become a part, unless it was the intendment of the agreement that the identical goods should be returned to Kemp-Booth in an altered form.

Such a bailment does exist where a tailor, like House of Irving, delivers the cloth, linings, buttons and all other materials necessary to make a coat, to a coatmaker, who puts the parts together and delivers them back to the tailor shop in the form of a finished garment. In that case the identical articles are returned by the bailee to the bailor in an altered form. The coat maker gets no title at any time to these materials. The law gives him a lien for his labor against the finished garment. The title to the materials remains at all times in the tailor.

If Kemp-Booth were engaged in the business of selling clothing, and furnished the materials to House of Irving for the work of manufacturing said materials into finished garments, the garments, when finished, to be returned to Kemp-Booth, we would have a clear case of bailment, and title to the goods would not pass the House of Irving.

But, in the case at bar, the goods were delivered to House of Irving with the intention that House of Irving might cut them up and consume them in manufacturing garments for the customers of House of Irving, adding thereto other materials belonging to House of Irving and making a finished product wholly different from the cloth furnished by Kemp-Booth. In the finished garments, so made, the cloth is so cut up that its identity is lost as woolen goods. It is impossible to retain title to an article when the person to whom it is delivered is authorized to mingle it with other articles, destroy its identity by cutting it into many pieces and manufacture it up into a garment which is designed to fit one particular person under a contract of manufacture to sell said garment to that one person.

In *Buffman v. Merry,* 3 Mason 478 (Cir. Ct. Rhode Island) 4 Fed. Cas. 604, cited by Cushman, Trial Judge (R. 21), A. delivered cotton yarn to H. under a contract that the same should be manufactured into plaids; H. was to furnish the filling out of other yarn belonging to him, and was to weave as many yards of plaids, at 15 cents per yard, as was equal to the value of the yarn, at 65 cents per pound.

Held, that by delivery of the yarn to H. the property thereof vested in him.

After delivery, and before manufacture, H. assigned to defendant for benefit of creditors. This was a suit in trover by A. to recover the yarn or its value.

Story, Circuit Justice. "My opinion upon this evidence is, that by the contract and delivery, the property in the yarn passed to Hutchinson. It was not a contract whereby the specific yarn was to be manufactured into cloth wholly for the plaintiff's account, and at his expense, and nothing but his yarn was to be used for that purpose. There the property in the yarn might not be changed; but here the cloth was to be made of other yarn as well as the plaintiff's, the warp of the plaintiff's yarn, the filling of the defendant's. The whole cloth, when made, was not to be delivered to the plaintiff, but so much only as at fifteen cents per yard would pay for the plaintiff's yarn at sixty-five cents per pound. What is this, but the sale of the yarn at a specified price, to be paid for in plaids at a specified price? Suppose after the delivery of the yarn to Hutchinson it had been burnt up, would not the loss have been his? Suppose after the plaids were manufactured, and before delivery of any part to the plaintiff, they had been destroyed, would the loss have been the plaintiff's? Certainly not. The plaids when manufactured would have been Hutchinson's and the plaintiff would not have been entitled to any part of them

before delivery to him in pursuance of the contract."

In the case at bar the cloth was not to be returned to Kemp-Booth even in its altered form, but something of equal value instead, namely money. If this distinguished jurist correctly defined the law applying to such a case, then the title to the woolens passed to House of Irving upon delivery, where the agreement contemplated their being worked up with other materials into garments.

In *Austin v. Seligman* (Cir. Ct., S. D., N. Y.) 18 Fed. 519, plaintiff delivered to the firm of Kempt & Co. certain jeweler's sweepings, to be refined, of the value of $4,292, and agreed to pay for the process of refining $320. It was agreed that the sweepings would be refined and the product thereof delivered to or accounted for, and the value thereof, less the agreed price for refining the same, paid to the plaintiff within 20 days from the delivery thereof. The court said:

"But the rule is well settled that when, by the terms of the contract under which property is delivered by an owner to another, the latter is under no obligation to return the specific property either in its identical form or in some other form in which its identity may be traced, but is authorized to substitute something else in its place, either money or some other equivalent, the tranasction is not a bailment, but is a sale or exchange. Here the agreement was that Kempt & Co. should return the refined product of the sweepings or account for the value there-

of, less the price for refining. They had an option which was inconsistent with the character of a bailment. (Citing cases). The case is not one where they had possesison of the plaintiff's property under an executory agreement to purchase, but one where the title passed on delivery, unless the delivery was a bailment. *It was not a bailment if they had a right to return the money in its place.*" (Italics ours)

Chisholm v. Eagle Ore Sampling Co. (Cir. Ct. of App. 8th Cir.) 144 Fed. 670, was an appeal by a trustee in bankruptcy from an order allowing a preferential claim of the Eagle Ore Sampling Co. against the estate of General Metals Company, a bankrupt ore smelting concern. The court said:

"It is a familiar rule that, where there is uncertainty as to the true meaning and intent of the contracting parties, the construction which they themselves have put upon it by their voluntary course of practice, when no controversy existed, is always to be given very great, if not controlling, effect.

"This is the way the business was conducted at the bankrupt's mill: Upon arrival a carload of ore which was given a number was weighed, and afterwards the empty car; the gross weight of the ore being thereby ascertained. (Follow details of taking samples). Now the remainder of the original lot of ore when crushed or rolled and ready for treatment was put upon the bedding floor of the mill and mixed with ore shipped by other parties. No attention was thereafter

paid by the claimant to its disposition by the bankrupt, nor was any attempt made to preserve its identity until payment upon the sample basis. It was then impossible to tell which was the claimant's ore and which the ore of others. * * * Again, settlements upon the sample basis were made by the delivery to the claimant of voucher checks. * * * In view of the foregoing, it seems clear to us that the parties acted under the contract as though the transactions were sales of the ore upon the basis of the assay values of samples. * * * Order reversed."

Jenkins v. Eichelberger (Pa.) 4 Watts 121, 28 Am. Dec. 691, is close to the facts of the case at bar. The reasoning of the court applies exactly to the facts of this case.

"Can we shut our eyes to the true nature of the transaction so as not to see that it was in substance a sale; and that the resale was a device to elude the wholesome principle of the common law, which forbids a lien to be created on chattels as a security separate from the possession? There is no reason why the vendor of the raw material should be secured to the detriment of the public, or in preference to the manufacturer; and if both can not be so, the contract must be construed in a way to make it consistent with rules of policy for the suppression of fraud, by uniting the ownership to the possession.

"* * * If the effect of the contract were even doubtful, the construction of it would be influenced by considerations of policy. To tolerate a

lien severed from the possession by any device whatever, would be pregnant with all the mischiefs of colorable ownership; and to sanction it at the expense of the community, could be justified but by the accomplishment of more important objects than individual accommodation. Policy and fair dealing require the courts to be as unsparing of transactions, whose effect is to impart a delusive credit or protect the property of debtors from their creditors, and to be as regardless of devices and forms, as they have ever been of transactions prohibited by the statutes of usury. The resources of ingenuity are inexhaustible; and to give entire effect to principles of policy, it is necessary to look at substance without respect to form. It is said that this species of transaction is so prevalent, that an immense amount of property will be affected by our decision. So much the more urgent is the demand for its suppression. If the dealers in raw hides themselves can not trust the tanners, they certainly can not expect that they will be suffered to secure the benefit of their custom by means which may induce other to trust them. Such were the means resorted to here; and whether the form of the action were well or ill chosen, it is sufficient for the purposes of the judgment, that the attempt to cover the property from the creditors of the vendee, is prohibited by policy and statute.

"Judgment affirmed."

In *Norton v. Woodruff*, 2 N.Y. 154, wheat was de-

livered to a miller who agree to give flour in return, a barrel of flour for each 4 15/16 bushels of wheat. The wheat burned before it was ground. Held, this was a sale and not a bailment.

> "The distinction between an obligation to restore the specific thing received, or of returning others of equal value, is the distinction between a bailment and a debt, so recognized by the decisions in England and this state." * * *

The case of *Foster v. Pettibone*, 7 N. Y. 433, involves another case where wheat was delivered to a miller to be ground into flour and the identical flour returned. It was held to be a bailment. The earlier cases were examined and the rule laid down distinguishing between bailment and sale reaffirmed.

In *Ewing v. French*, 1 Blackfords Rep. (Ind. 1825) 353, wheat was delivered to a miller.

> "By the contract, flour was to be delivered in exchange for wheat. From the moment the defendants received the wheat, they became liable for the flour. There was no bailment in the case. The wheat itself was not to be returned, nor the identical flour manufactured from it. The wheat was thrown into the common stock of wheat in the mill belonging to the company, and flour was to be delivered in exchange. It was a sale of wheat to be paid for in flour."

The case of *Slaughter v. Green* (Va. 1821) 1 Randolph 3, 10 Amer. Dec. 488, was long regarded as a border line case. In that case wheat was delivered to a miller by several farmers "to be ground into flour." By custom and the necessities of the case the

wheat from the several bailors was mixed in a common mass. It was expressly found that there was in the mill, at the time of the fire, flour, etc., enough to satisfy all claims upon the mill for the same. It was held to be a bailment and not a sale since the bailee had no right to sell or dispose of either the wheat or the flour except so much of it as was agreed to be his for the grinding.

> "Where a warehouseman receives wheat, and by the consent of the owner, or in accordance with the custom of the trade, mixes the wheat in a common mass with the other wheat in his warehouse, and with the understanding that he is to retain or ship the same for sale on his own account, at pleasure, and, on presentation of the warehouse receipt, is either to pay the market price thereof in money, or re-deliver the wheat, or other wheat in place of it, the transaction is not a bailment, but is a sale, and the property passes to the depositary, and carries with it the risk of loss by accident." (Syl.)
>
> *Chase v. Washburn*, 1 Ohio St. Rep. 244.

From the foregoing cases and many others which might be cited it can be seen that in the very earliest times in the oldest states in this country as well as in the Supreme Court of the United States the distinction was clearly defined between a bailment and a sale. This is a question on which there is no division of authorities. The law is, and, for a century has been well settled. The only difficulty is in determining what the facts are in a given case and applying the well settled principles of law thereto.

Point 2—Restriction on Sales

2. Where alleged consignor restricts sales which alleged consignee may make either to (1) a prescribed class of persons or (2) in a prescribed territory; or (3) for prescribed prices or (4) for cash only or (5) as to terms of credit either open account or notes, a consignment is indicated.

But where, as in the case at bar, the consignee is at liberty to sell at any price he likes, but is bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time the relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, but on his own account for he is to pay a price which may be different from those fixed by the contract with his customer.

Mitchell Wagon Co. v. Poole, 235 Fed. 817;
In re Penny & Anderson, 176 Fed. 141;
Taylor v. Fram (C.C.A.) 252 Fed. 465, 40 A. B. R. 377;
In re Leflys, 229 Fed. 695, 36 A. B. R. 306;
Chickering v. Bastress et al. (Ill.) 22 N. E. 542;
In re Rabenau, 118 Fed. 471;
Newmark on Sales, Sec. 23;
Weston v. Brown, 53 N. E. 36;
In re Martin-Vernon Music Co., 132 Fed. 983 (p. 984);
In re U. S. Electrical Supply Co. (Ill. D. C.) 2 Fed. (2d) 378;

In re Agnew, 178 Fed. 478, p. 481, 23 A. B. R. 360;

In re Higrade Electric Store (So. Dist. Cal. 1924) 3 A. B. R. (N.S.) 78;

Miller Rubber Co. v. Citizens' Trust, etc., Bank, In re Newerf's Estate, 233 Fed. 488, 147 C. C. A. 374, 37 A. B. R. 542.

Point 3—Return of Goods on Termination of Contract

This contract provides:

"*Seventh*: Either party to this agreement may terminate the same by giving to the other three days' written notice of its intention to terminate the same, and at the termination thereof all goods in possession of the party of the second part belonging to the party of the first part shall be returned to the party of the first part.

"*Eighth*: The party of the first part shall have the right to check up and inspect and/or to withdraw any part or all of the said merchandise at any time without notice to the party of the second part."

These provisions of the contract are consistent with a consignment but are also consistent with the sale of goods on credit with reservation of title as security for the purchase price. Hence of no value in determining a controversy of this nature.

Points 4, 5, 6—Reports of Sales—Reservation of Title to Proceeds of Sales and Accounting

Where sales are reported at stated intervals by agent to principal giving names and addresses of purchasers, sales prices, terms, etc.; where title is re-

served in principal to any moneys, accounts, notes, etc., resulting from sales, as trust funds; where there is accounting, at stated intervals, by agent to principal, for all proceeds of sales, either turning cash, notes and accounts over to principal or making other satisfactory accounting therefor, a consignment is indicated.

But where there is a total absence of such reports, or, as in the case at bar, a bare report of sales, without any details as to identity of the purchasers or sales prices or terms, or a failure by alleged consignee to insist upon compliance with such a provision; where as in the case at bar, there is a total absence of reservation to principal of title to the moneys, accounts or notes arising from sales, or failure to insist upon compliance with such provision; where the alleged agent merely makes payment, from time to time, to alleged principal of money, in lump sums, similar to payments made to other creditors the transaction is not a bailment. The relation is not that of principal and agent. The transaction is a conditional sale; and the relation is that of debtor and creditor, at least, in so far as the rights of subsequent creditors are involved.

Points 7-8—Separation of Goods and Proceeds of Sales

Where alleged consigned goods are kept separate from other goods of the bankrupt it is an element pointing to a bailment.

But where, as in the case at bar, the goods were mingled with the other goods of alleged consignee, without distinguishing marks sufficient to identify the

woolens sent by defendant from other goods on the shelves, this condition gave House of Irving all the indicia of ownership so far as the public was concerned, and points to a sale on credit. The contract provided that the merchandise should be kept separate from other merchandise on the premises. But that was not sufficient where there was nothing to distinguish the Kemp-Booth merchandise from the other merchandise, to the public.

Flanders Motor Co. v. Reed, 220 Fed. 642, 33 A. B. R. 842;

In re High Grade Elec. Store, 3 A. B. R. (N.S.) 78;

Miller Rubber Co. v. Citizens Trust, 37 A. B. R. 542;

Taylor v. Fram, 252 Fed. 465, 40 A. B. R. 377.

Where alleged consigned goods as well as proceeds of sales of same are kept separate from other goods and other moneys of alleged consignee the relation of bailor and bailee is indicated. Such was the case of

John Deere Plow Co. v. McDavid, 137 Fed. 802;

Franklin v. Stoughton Wagon Co. (8th C. C. A. 1909) 168 Fed. 857;

Ludvigh v. Amer. Woolen Co., 231 U. S. 552, 58 Law Ed. 345;

In re King, 262 Fed. 318;

General Electric Co. v. Brower, 221 Fed. 597.

On the other hand where, as in the case at bar, the alleged consigned goods were mingled with other goods of alleged consignor and proceeds of sales of

alleged consigned goods mingled with the other moneys of alleged consignee, with knowledge of alleged consignor; remittances made to alleged consignor out of these mingled moneys; also other creditors and expenses of business paid out of said mingled funds, the relation of debtor and creditor is indicated.

It is an inevitable incident to a valid consignment contract that the proceeds of sales of consigned goods shall be kept separate and apart, and not intermingled with the proceeds from sales of other goods of the consignee. This is an irrevocable result of the relationship of principal and factor, the principal retaining control of the goods and of the proceeds therefrom, and paying its factor a commission.

In re U. S. Electrical Supply Co. (D. C. Ill.) 2 Fed. (2d) 378, 5 A. B. R. (N. S.) 319;

In re Agnew (D. C. Miss.) 178 Fed. 478, 23 A. B. R. 360;

High Grade Elec. Store, 3 A. B. R. (N. S.) 78;

In re Shiffert (D. C. Penn.) 281 Fed. 284;

Schultz as trustee v. Wesco Oil Co., 149 Wash. 21;

Flanders Motor Co. v. Reed, 220 Fed. 642; 33 A. B. R. 842;

In re Penny & Anderson, 176 Fed. 141;

Adriance et al. v. Rutherford, 23 N. W. 718;

In re Wells, 140 Fed. 752;

Taylor v. Fram (C. C. A. 2d Cir. 1918) 252 Fed. 465, 40 A. B. R. 377.

Point 9—Notice to Public or Secrecy

Where business is done by consignee *openly* as agent of consignor, and the public generally, customers and other creditors are given notice by signs on premises, stationery, bill heads and correspondence and/or an instrument of record gives constructive notice, it indicates a consignment.

General Electric Co. v. Brower, 221 Fed. 597.

But where, as in the case at bar, the agreement is secret; the public not given either actual or constructive notice; and the alleged consignee deals with the public, customers and other creditors as though the alleged consigned goods were his own, and alleged consignor acquiesces, a sale is indicated. The authorities already quoted support this proposition. We do not repeat them here.

Points 10-11—Sales Price and Commission

Where the agent sells goods for a price fixed by his principal, and he has no discretion as to fixing price or terms of credit, retains for his compensation a commission on actual sales and remits the balance of moneys collected to his principal, it indicates a bailment.

But where the alleged consignee sells for any price he sees fit; where he has to pay alleged consignor a fixed price for the goods sold; where he determines the terms of credit he will extend, and to whom credit will be extended; where he pays for the goods sold at stated intervals, regardless of whether or not he has collected the purchase price; where, if he sells

for more or less than the price he has to pay the alleged consignor, he enjoys the profit or bears the loss; where, if a credit customer does not pay, he stands the loss; where he has the right at any time to pay the stipulated price for the goods and acquire title thereto—such a relationship is that of debtor and creditor upon an agreement for special terms of credit. *It amounts to this. The debtor has complete dominion over the goods. He is bound to pay a stipulated price for them on the happening of a future event; namely, a resale or use by him. Title is reserved in creditor in such a case as security for the purchase price and fire insurance is required to make doubly sure.*

Granite Roofing Co. v. Casler, 46 N. W. 728;
Buffum v. Descher, 96 N. W. 352;
In re Linforth, Fed. Cas. 8369.

The courts often declare such contracts as mere contrivances to secure the purchase price to the vendor and fraudulent as to the other creditors of the vendee.

In re Roellech (D. C. Ore.) 223 Fed. 687; 35 A. B. R. 164;
In re Rasmussen Estate (D. C. Ore.) 136 Fed. 704;
In re Carpenter, 125 Fed. 831;
In re Zephyr Merc. Co., 203 Fed. 576.

Point 13—Burdens of Ownership

Where the alleged consignor bears the burdens of ownership such as freight, expressage, taxes, insurance, depreciation and assumes the risks of fire, theft, bad credits and losses from sale below original invoice

the relation of consignor and consignee is indicated.

Sturm v. Boker, 150 U. S. 312, 37 Law Ed. 1093, 14 Supreme Court Rep. 99.

But where, as in the case at bar, the alleged consignee is required to bear some or all of these burdens and lossses it is evidence indicating a sale. Here Irving paid for fire insurance and assumed the risks of theft, and bad credits and loss from sales below cost of manufacture.

If Ambiguous the Contract Must be Construed Against Appellant

This contract was drafted by appellant, and is therefore to be construed most strongly against defendant.

> "Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter * * *"
>
> Williston, Contracts Vol. II, Sec. 621, pp. 1203, 1204;
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> *In re Eighth Ave.*, 82 Wash. 398 (402), 144 Pac. 533, which states:
>
> "While parol evidence is seldom permitted to contradict a written contract, when the contradiction appears in the written evidence itself, the matter should be resolved most strongly against the party at whose instance the words were used."

Vol. I, Meacham on Sales, Sec. 46, says:

> "In doubtful cases, however, moreover, these

ambiguous contracts are construed most strongly against their framers, if such a construction is necessary to protect the rights of others. As remarked in one case of such a contract: 'In view of its uncertainty and contradictory provisions, the court will see that third persons are not prejudiced by its construction'." Citing *Arbuckle v. Kirkpatrick* (1897) 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285.

The Parties Did Not Operate Under the Contract as Consignor and Consignee

1. The terms of the contract were not workable under the circumstances of the parties. In practice the contract was utterly ignored in almost all of its principal provisions.

> "Whether the transaction was a bailment or a sale will not be determined solely by the words employed in the written instrument. Its meaning being doubtful, the court will look also to the acts and circumstances of the parties, especially to the construction which they, themselves, put upon the contract, in executing it. The real characteristics of a sale or their legal effects are not changed by calling it a bailment. The court will look to the purpose of the contract rather than to the name given it."
>
> *Samson Tire & Rub. Co. v. Eggleston* (C. C. A. 5th) 45 Fed. (2nd) 502, 504.

2. By its terms, the contract, Paragraph Ninth, authorizes House of Irving to sell the alleged consigned goods. But it was never the intention that

House of Irving should do so. In fact, it was expressly agreed that he could not resell the goods. The provision was a nullity *ab initio.*

3. By its terms, the contract Paragraph Tenth, authorizes House of Irving to manufacture the alleged consigned merchandise up into clothing for sale and "title to such garments shall remain" in Kemp-Booth Co., Ltd. Upon sale, House of Irving to receive for its services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise.

4. No provision is made for transferring from House of Irving to Kemp-Booth Co. of title to the trimmings, linings, buttons, labor, etc., which are necessarily added to the cloth to constitute a tailor-made suit.

5. When a piece of cloth containing 3 1/3 yards is cut up into a dozen or two dozen pieces to conform to size and build of a particular man, the identity of that cloth as a suit pattern is lost. It cannot be used as a rule for any other man. Its value is practically *nil* for any purpose except to be built into a suit for the one man whom such a suit will fit. After such cutting the cloth manifestly could not be returned to Kemp-Booth Co. The linings and other trim, except buttons, are likewise cut into small pieces which become valueless upon such cutting unless they are built up with the cut out pattern into a finished coat, vest and trouser or overcoat, as the case may be.

6. Title to these trimmings, linings, buttons, thread, etc., can not "*remain*" in Kemp-Booth Co.

unless title should somehow *vest* in Kemp-Booth Co. It cannot *vest* in Kemp-Booth Co. unless it is *transferred to* Kemp-Booth Co. from House of Irving. The contract does not provide for such transfer.

7. But the actual fact is that the cloth, trimmings and linings were cut up and assembled into finished clothing in every case pursuant to a *special contract* between the House of Irving, on the one side, and one of its customers, on the other, *to manufacture* said suit, out of raw materials, exhibited to the customer, with an implied warranty—if not expressed warranty,—that these raw materials belonged to House of Irving, and that House of Irving could and would transfer good title to such finished clothing to the customer upon their being completed. The terms of payment were a matter of contract entirely between House of Irving and its customer.

8. These terms were never submitted to Kemp-Booth Co. for its approval, nor was there any such thing required by the contract. Kemp-Booth Co. acquiesced in House of Irving's conduct of this alleged consignment in this manner, with full knowledge thereof, during the entire life of the contract. Kemp-Booth Co. manifestly entered into the agreement with full knowledge of House of Irving's method of doing business. And the law will presume that Kemp-Booth Co. never intended that every sale made by House of Irving after the making of this contract should be fraudulent as to the vendee. Hence, Paragraph Tenth of the contract was not workable; was not adaptable to the circumstances of the case and the necessities of the business; did not state the true

intent of the parties; was a sham and a fraud upon every customer and every subsequent creditor of House of Irving from its inception; it was a cloak to conceal from other creditors a secret contract of conditional sale which the parties did not want these customers and creditors to know about.

9. No secret lien was reserved or could be lawfully reserved to Kemp-Booth for the price of its cloth against the finished suit since such lien would be a fraud upon the customer unless called to his attention and he assented thereto.

10. It is clear then that this entire contract was conceived, and planned as a sham to cover up another and entirely different agreement. Kemp-Booth Co. had for many years sold large quantities of goods to House of Irving upon credit, and desired to continue to sell goods to House of Irving. But the credit of House of Irving had declined to such an extent that the corporation was actually insolvent, and this was known to the officers of Kemp-Booth Co. The latter did not deem it safe to extend credit longer to House of Irving for Three Thousand Dollars, the amount of credit that House of Irving desired. This alleged consignment agreement was resorted to as an expedient for the occasion. By it Kemp-Booth Co. would enjoy the profits of the business of House of Irving without incurring any of the dangers involved in extending credit to a failing, if not already insolvent, concern. If House of Irving retrieved its losses and continued to operate Kemp-Booth Co. would profit thereby. If House of Irving should eventually fail in business, Kemp-Booth Co. would reclaim its goods and sustain

no loss. It was a very attractive arrangement for both parties. Had the contract been recorded or actual notice given to subsequent creditors it would have been good perhaps as between the parties and existing creditors.

11. But such notice, actual or constructive, would have at once destroyed the credit of the House of Irving and given notice of its insolvent condition. Hence the necessity for secrecy.

12. It is doubtful if a valid consignment agreement could be drawn to cover the facts of this case and serve all the hidden purposes of the parties.

13. Whatever the contract is, it is certainly not a consignment, for the sale of goods by an agent for his principal.

14. It is certainly not a bailment for the manufacture of cloth into clothing for the bailor.

IN CONCLUSION

Considering the previous relations of the parties, and the insolvent condition of the House of Irving, it is evident that the agreement is a cloak to conceal from subsequent creditors and other existing creditors a conditional sale of goods on credit accompanied by a reservation of title in vendor as security for the purchase price.

Summary of Elements of Consignment Lacking

The public had no notice either actual or constructive of the agreement. The vendor here clothed the vendee with all the indicia of ownership of the goods. The title to the goods passed from Kemp-

Booth Co. to House of Irving and from House of Irving to the customer. The conduct of the parties shows none of the requirements held by the courts to be earmarks of the relation of principal and agent such as restrictions of sales as to class of persons, territory, prices, terms or credits; reports on sales giving names and addresses of purchasers, sales, prices, terms, etc.; reservation in principal of title to any moneys, accounts or notes resulting from sales, as trust funds held by agent for his principal; accounting at stated intervals by agent actually turning over to principal cash, notes and accounts, or making other satisfactory accounting therefor; segregation of alleged consigned goods from other goods in the premises belonging to bankrupt with distinguishing marks which will give notice to the public of the ownership by the alleged consignor; segregation of moneys, accounts and other proceeds of sale of alleged consigned goods from the other moneys, accounts, etc., of bankrupt at all times so that there is no commingling of trust funds with the moneys of bankrupt; transaction of business by alleged consignee *openly* as agent of alleged consignor and other actual notice to the public generally, customers and other creditors especially subsequent creditors of the relationship by signs on the premises, stationery, bill heads, correspondence and/or constructive notice by a recorded instrument; control by the alleged principal of the price and terms of credit to be extended; remittance of actual moneys collected, less an agreed commission to be deducted therefrom by the agent for his services; enjoyment by the alleged consignor of

all profits from the business and bearing all losses as well as such burdens of ownership as freight, insurance, depreciation, fire, theft, bad credits and losses from sale below original invoice or cost price.

Summary of Elements of Sale Present

But on the contrary the conduct of the parties is consistent only with the theory that their *actual* relation behind this *written cloak* was that of debtor and creditor; bare reports of goods used but no details as to prices, terms, purchasers, or moneys collected; no reservation of proceeds of sales as trust funds; no accounting for proceeds of sales, merely a check up on stock to confirm correctness of reported consumption of goods; no turning of actual moneys or notes or accounts over to alleged principal, merely payment of lump sums of money similar to payments to other creditors; complete secrecy maintained as to claimed consignment; no control by Kemp-Booth Co. of sales price of clothing or terms of credit extended to customers; no remittance of actual collections less an agreed commission—in fact, no commission was ever agreed upon at all. The alleged consignee enjoyed all profits of the business, if any, and bore all losses as well as all the burdens of ownership such as insurance, depreciation, fire, theft, bad credits and losses from sale below invoice or cost price.

In short House of Irving bought these goods under an agreement by which *time of payment was dependent on use of the goods* and title was reserved in vendor as security for the purchase price. To call such an arrangement as this a consignment is a misuse of words. This sham agreement should be torn

away by the court and the true agreement exposed as a fraud upon subsequent creditors.

We are aware that we have not discussed each individual case cited by the appellant. We have refrained from doing so for the reason that such a discussion would prolong this brief to an improper length, but we call the court's attention to the fact that in the great majority of cases involving the question of validity of consignments cited by appellant the transaction was either a consignment for sale or a sale outright. While in the case at bar the transaction was an attempt secretly to consign merchandise for future consumption or use, and the issue squarely before the court in this case is whether a secret consignment of goods for consumption by the consignee can be made in Washington. The trial court was of the opinion that such a consignment can not be made, and that the attempt to do so, evidenced in this case, was, in reality, a sale.

We respectfully submit that the judgment of the trial court is right and should be affirmed.

EARL G. RICE,
Solicitor for Appellee.
MCCLURE & MCCLURE,
WALTER A. MCCLURE,
WM. E. MCCLURE.
Solicitors for Appellee.